UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF WATER

MEMORANDUM

SUBJECT: Office of Management and Budget Review: *Federal Register* Notice, Proposed Request for Public Comments on the Definition of Waters of the United States – Recodification of Preexisting Rules

FROM: John Goodin, Acting Director
Office of Wetlands, Oceans and Watersheds John Goodin 28 APRIL 2017

TO: Michael H. Shapiro
Acting Assistant Administrator

This memorandum transmits the *Federal Register* notice requesting public comments on the proposed rule to rescind the 2015 Clean Water Rule and recodify the preexisting regulatory definition of "waters of the United States." I request that you review the notice and transmit it to the Office of Policy for their review and submittal to the Office of Management and Budget to initiate. E.O. 12866 review.

The attached draft proposed rule developed by EPA and the Department of the Army is the first step of a two-step response to the February 28, 2017, Presidential Executive Order on "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." The first step is to revise the Code of Federal Regulations to recodify the definition of "waters of the United States" which currently governs administration of the Clean Water Act, in light of a decision by the U.S. Court of Appeals for the Sixth Circuit staying a definition of "waters of the United States" promulgated by the agencies in 2015. This regulatory text would be administered as the regulations are currently being implemented, consistent with Supreme Court decisions, agency guidance documents, and longstanding practice.

OWOW received and incorporated comments from OGC, Army and Corps before finalizing this draft. If you need additional information or have questions regarding this notice, please call me at 202-566-1373.

Attachment

To: Kupchan, Simma[Kupchan.Simma@epa.gov]; Downing, Donna[Downing.Donna@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
Cc: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]
From: Jensen, Stacey M CIV USARMY HQDA (US)
Sent: Thur 4/6/2017 12:28:40 PM
Subject: RE: Format of proposed rule text?
Jensen_Step 1 Rule Drafts.docx

A few minor edits. Thank you, Simma!

-----Original Message-----
From: Kupchan, Simma [mailto:Kupchan.Simma@epa.gov]
Sent: Wednesday, April 05, 2017 5:23 PM
To: Downing, Donna <Downing.Donna@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Jensen, Stacey M CIV USARMY HQDA (US) <Stacey.M.Jensen@usace.army.mil>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>
Subject: [Non-DoD Source] RE: Format of proposed rule text?

Thanks to all for your input. Attached is a draft strikethrough rule text. I welcome your review.

Simma Kupchan

Water Law Office

US EPA Office of General Counsel

William Jefferson Clinton Building North Room 7426Q

(p) 202-564-3105

From: Downing, Donna
Sent: Wednesday, April 05, 2017 3:15 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Stacey Jensen <Stacey.M.Jensen@usace.army.mil>
Subject: RE: Format of proposed rule text?

Deliberative Process / attorney client Ex. 5

Deliberative Process / attorney client Ex. 5

Deliberative Process / attorney client Ex. 5

Deliberative Process / attorney client Ex. 5

From: Christensen, Damaris

Sent: Wednesday, April 05, 2017 2:40 PM
To: Kupchan, Simma <Kupchan.Simma@epa.gov <mailto:Kupchan.Simma@epa.gov> >; Wehling, Carrie <Wehling.Carrie@epa.gov <mailto:Wehling.Carrie@epa.gov> >; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov <mailto:Eisenberg.Mindy@epa.gov> >; Downing, Donna <Downing.Donna@epa.gov <mailto:Downing.Donna@epa.gov> >; Stacey Jensen <Stacey.M.Jensen@usace.army.mil <mailto:Stacey.M.Jensen@usace.army.mil> >
Subject: RE: Format of proposed rule text?

I think Deliberative Process / attorney client Ex. 5
Deliberative Process / attorney client Ex. 5

Might be Deliberative Process / attorney client Ex. 5

From: Kupchan, Simma
Sent: Wednesday, April 05, 2017 2:36 PM
To: Wehling, Carrie <Wehling.Carrie@epa.gov <mailto:Wehling.Carrie@epa.gov> >; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov <mailto:Eisenberg.Mindy@epa.gov> >; Downing, Donna <Downing.Donna@epa.gov <mailto:Downing.Donna@epa.gov> >; Christensen, Damaris <Christensen.Damaris@epa.gov <mailto:Christensen.Damaris@epa.gov> >; Stacey Jensen <Stacey.M.Jensen@usace.army.mil <mailto:Stacey.M.Jensen@usace.army.mil> >
Subject: Format of proposed rule text?

All,

In "drafting" the proposed rule text for next week's meeting, do we Deliberative Process / attorney client Ex. 5
Deliberative Process / attorney client Ex. 5 ?

Or c Deliberative Process / attorney client Ex. 5
Deliberative Process / attorney client Ex. 5

I wanted to nail down today as I will be Personal Matters / Ex. 6

Thanks,

Simma Kupchan

Water Law Office

US EPA Office of General Counsel

William Jefferson Clinton Building North Room 7426Q

(p) 202-564-3105

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Downing, Donna[Downing.Donna@epa.gov]
Cc: Moyer, Jennifer A CIV USARMY CEHQ (US)[Jennifer.A.Moyer@usace.army.mil]; Jensen, Stacey M CIV USARMY HQDA (US)[Stacey.M.Jensen@usace.army.mil]; David.F.Dale@usace.army.mil[David.F.Dale@usace.army.mil]
From: Personal Matters / Ex. 6 CIV USARMY HQDA ASA CW (US)
Sent: Fri 3/31/2017 9:30:49 PM
Subject: WOTUS2: Schedule Updates
STAFF AGENDA.docx
Task Management and Tracking.xlsx
Leadership AGENDA.docx
CWR_Schedule_31Mar17_Condensed.pdf
CWR_Schedule_31Mar17_Expanded.pdf

Hi Donna and Mindy:

Deliberative Process / Ex. 5

Thanks!
Personal Matters / Ex. 6

PRE-DECISIONAL/FOR OFFICIAL USE ONLY/NOT FOR DISTRIBUTION.

Personal Matters / Ex. 6
Environmental Planner
Office of the Assistant Secretary of the Army (Civil Works)
Project Planning and Review
441 G Street, NW Rm Personal Matters / Ex. 6
Washington, DC 20314
tel: Personal Matters / Ex. 6
cel: Personal Phone / Ex. 6

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Wendelowski, Karyn
Sent: Mon 3/27/2017 4:31:56 PM
Subject: Re: WOTUS follow up
ENV_DEFENSE-#793193-v1-WOTUS_-_file-stamped_response_brief.pdf

Great - here you go.

From: Eisenberg, Mindy
Sent: Monday, March 27, 2017 12:29 PM
To: Wendelowski, Karyn
Subject: RE: WOTUS follow up

I had a chance to talk with her at a meeting and she is interested in it, so if you wouldn't mind emailing it to me I can pass it along.

Thanks!

Mindy Eisenberg
Acting Director, Wetlands Division
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4502T
Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

-----Original Message-----
From: Wendelowski, Karyn
Sent: Monday, March 27, 2017 10:01 AM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: Re: WOTUS follow up

Attorney Client / Ex. 5

Karyn Wendelowski
Attorney Advisor
Office of General Counsel
(202) 564-5493

> On Mar 27, 2017, at 8:37 AM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:
>
> No, should I? She didn't ask us for it
>
> Sent from my iPhone
>
>> On Mar 27, 2017, at 8:16 AM, Wendelowski, Karyn <wendelowski.karyn@epa.gov> wrote:
>>
>> Great-did you send the brief?
>>

>> Karyn Wendelowski
>> Attorney Advisor
>> Office of General Counsel
>> (202) 564-5493
>>
>>> On Mar 27, 2017, at 8:02 AM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:
>>>
>>> Thanks Karyn. I sent electronic copies forward on Friday and will have our SEE drop off hard copies this morning.
>>>
>>> Sent from my iPhone
>>>
>>>> On Mar 27, 2017, at 8:00 AM, Wendelowski, Karyn <wendelowski.karyn@epa.gov> wrote:
>>>>

Attorney Client / Ex. 5

>>>> Mindy would you like me to send electronic copies of everything to Sarah (if like to add our 6th Cir merits brief to the list for its Scalia discussion)? Or I can send you an email with the attachments for you to send to her?
>>>>
>>>> Karyn Wendelowski
>>>> Attorney Advisor
>>>> Office of General Counsel
>>>> (202) 564-5493
>>>>
>>>>> On Mar 25, 2017, at 11:17 AM, Kwok, Rose <Kwok.Rose@epa.gov> wrote:
>>>>>
>>>>> I didn't search relatively permanent though, only Scalia and
>>>>> plurality in the documents I sent in a separate email
>>>>>
>>>>> Sent from my iPhone
>>>>>
>>>>>> On Mar 25, 2017, at 8:04 AM, Kwok, Rose <Kwok.Rose@epa.gov> wrote:
>>>>>>
>>>>>> I did the search in the TSD and preamble and emailed them both
>>>>>> before I left. I'll forward if it's still in the emails in my
>>>>>> phone
>>>>>>
>>>>>> Sent from my iPhone
>>>>>>
>>>>>>> On Mar 24, 2017, at 9:14 PM, Christensen, Damaris <Christensen.Damaris@epa.gov> wrote:
>>>>>>>
>>>>>>> FWIW - here's what came up in the single document containing all the RTC essays (but not any individual responses or comments themselves) - only three essays. The first one directly addresses Scalia only jurisdiction; the second two mention it more tangentially.
>>>>>>>
>>>>>>> Essay 15
>>>>>>> Several commenters assert that the agency should not look to Justice Kennedy's concurring opinion in Rapanos as a legal basis for establishing the scope of waters of the United States. Other commenters assert that the final rule is inconsistent with Justice Scalia's opinion in Rapanos.
>>>>>>> The agencies believe the rule is appropriately premised on the significant nexus standard as articulated by Justice Kennedy. The four dissenting Justices in Rapanos, who would have affirmed the court of appeals' application of the agencies' regulation, also concluded that the term "'waters of the United States' encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy." Id. at 810 & n.14 (Stevens, J., dissenting). Neither the plurality nor

the Kennedy opinion invalidated any of the current regulatory provisions defining "waters of the United States." As set forth in greater detail in the Technical Support Document, all U.S. Courts of Appeal and virtually all U.S. District Courts that have applied Rapanos have held that Justice Kennedy's standard may be applied to identify jurisdictional waters.
>>>>>>>
>>>>>>> Issue: Legality of Asserting Jurisdiction over Ephemeral Waters
>>>>>>> A number of commenters questioned the agencies' legal ability to assert jurisdiction over ephemeral waters. Some observed that Congress did not intend the Clean Water Act (CWA) to regulate ephemeral streams, instead limiting the CWA's jurisdiction to waters and not landscape features which can transmit waters such as dry washes, arroyos, and ephemeral streams. Several commenters noted that Justice Kennedy's opinion in Rapanos called for the agencies to identify categories of jurisdictional tributaries and the volume of flow and other factors taken into consideration. They asserted that considering ephemeral waters as "tributaries" relies on a mere hydrologic connection and not the presence of the significant nexus that Justice Kennedy indicated was the basis for jurisdiction. Other commenters believed that omission of the "relatively permanent" requirement from Justice Scalia's opinion in Rapanos substantially broadens the universe of jurisdictional tributaries, and call for the agencies to incorporate the approach in the 2008 Rapanos Guidance, which indicates tributaries that flow after rainfall are subject to a case-specific significant nexus analysis. Some commenters asserted that Supreme Court precedent requires both the Kennedy and Scalia standards to be met, and only relatively permanent waters with a significant impact are protected.
>>>>>>>
>>>>>>> The final rule concludes that all waters meeting the definition of "tributary" have a significant nexus, regardless of their flow regime, and thus are considered as per se waters of the United States. CWA jurisdiction has historically been asserted over intermittent and ephemeral waters. The longstanding regulatory definition of "waters of the United States" included "tributaries" without any limitations regarding volume or duration of flow. The December 2008 Guidance on post-Rapanos implementation noted that tributaries that flow only in direct response to rainfall are subject to the CWA if they have a significant nexus to a downstream traditional navigable water, and that intermittent or seasonal streams were jurisdictional without the need for a case-specific showing of significant nexus. Federal court decisions, some of which are decades old, have supported assertions that intermittent and ephemeral waters are jurisdictional. See the summary response 8.1 above and 8.1.2 below for further discussion about CWA protection of ephemeral tributaries. The discussion above summarizes the scientific basis for the rule's conclusion that tributaries, as defined, have a significant nexus and thus are "waters of the United States," including tributaries with ephemeral flow. See the Technical Support document for a complete discussion of the legal basis for asserting jurisdiction over ephemeral tributaries, section VII including VII.B.vi, and the appropriateness of applying Justice Kennedy's significant nexus standard to tributaries. See also the summary responses in Section 9 "Scientific Evidence Supporting the Rule" of the Response to Comments.
>>>>>>>
>>>>>>> 9(d) The Science Report and Congressional/Supreme Court Intent
>>>>>>> Some commenters were concerned that the assumptions in the draft Science Report were not consistent with the constitutional limits of the Clean Water Act (CWA) or the legal thresholds defined by the Supreme Court. Some commenters were concerned that the Agencies were using the draft Science Report to apply the significant nexus test beyond Kennedy's intent or to expand categorical jurisdiction beyond what was intended by Scalia. Other commenters raised concerns that Kennedy focused on wetlands as adjacent, not all waters. Some commenters noted that aggregation should also only be applied to wetlands because of Kennedy's statements. Some commenters felt that because the Science Report does not consider the significance of connections, it is contradictory to Supreme Court direction for a rulemaking. Some commenters stated that the SAB recommendations provided limited support for the Proposed Rule to regulate all Waters of the U.S.
>>>>>>>
>>>>>>> On the other hand, some commenters stated that scientific evidence of connectivity is essential in applying Kennedy's significant nexus test, and noted that the draft Science Report provides a strong foundation for the proposed definition because it provides more than speculative or insubstantial scientific evidence of connectivity, as required by Kennedy.
>>>>>>>

>>>>>>> Some commenters felt that the basis of the draft Science Report was flawed because it did not focus specifically on the effects to water quality in navigable waters. These commenters felt that without that specific water quality endpoint, connections would not have any relevance to the legal scope of the CWA. These commenters noted that most of the research in the Science Report does not directly and specifically address pollutant transport to and effect on the quality of navigable waters. Commenters felt that studies were irrelevant where they do not establish how connections affect water quality. For example, studies focused on the retention of flood waters are not relevant because they relate to downstream water quantity, not quality.
>>>>>>>
>>>>>>> 9(d) Agencies' Response
>>>>>>> While a significant nexus determination is primarily weighted in the scientific evidence and criteria, the agencies also consider the statutory language, the statute's goals, objectives and policies, the case law, and the agencies' technical expertise and experience when interpreting the scope of the CWA. For this reason, the SAB was not asked to interpret the language of the Rapanos decision or to make judgments on what waters have a "significant nexus". Instead, the SAB was asked to review the science underpinning the Science Report, including peer-reviewed literature on water quality functions and the contribution of nutrients, sediment, and contaminants from upstream sources such as streams, wetlands, and open waters. Moreover, the SAB's September 30, 2014 letter to the Administrator supports the science-based conclusions in the Proposed Rule.
>>>>>>>
>>>>>>> With regard to the commenters' concern that any effects be tied to the water quality of receiving waters, Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and this includes, but is not limited to water quality. The Science Report considered the effects of upstream waters on the chemical, physical, and biological integrity of downstream waters. All three elements can significantly influence the quality of downstream waters, not just chemical water quality effects. Peer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands play a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and many other vital chemical, physical, and biological processes in downstream waters. Also, see the Preamble.
>>>>>>>
>>>>>>> -----Original Message-----
>>>>>>> From: Eisenberg, Mindy
>>>>>>> Sent: Friday, March 24, 2017 8:39 PM
>>>>>>> To: Wendelowski, Karyn <wendelowski.karyn@epa.gov>
>>>>>>> Cc: Christensen, Damaris <Christensen.Damaris@epa.gov>
>>>>>>> Subject: Re: WOTUS follow up
>>>>>>>
>>>>>>> Thanks Karyn! We'll take care of the hard copies but doing a search would be a huge help!
>>>>>>> Mindy
>>>>>>>
>>>>>>> Sent from my iPhone
>>>>>>>
>>>>>>>> On Mar 24, 2017, at 6:06 PM, Wendelowski, Karyn <wendelowski.karyn@epa.gov> wrote:
>>>>>>>>
>>>>>>>> I can send her all those hard copies and I'll do a search Attorney Client / Ex. 5 Attorney Client / Ex. 5 I'll cc you on whatever I send.
>>>>>>>>
>>>>>>>> Karyn Wendelowski
>>>>>>>> Attorney Advisor
>>>>>>>> Office of General Counsel
>>>>>>>> (202) 564-5493
>>>>>>>>
>>>>>>>>> On Mar 24, 2017, at 3:45 PM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:
>>>>>>>>>
>>>>>>>>> Sigh. Not sure if Rose had time. Deliberative Process / Ex. 5

>>>>>>>>>
>>>>>>>>> Mindy Eisenberg
>>>>>>>>> Acting Director, Wetlands Division Office of Wetlands, Oceans
>>>>>>>>> and Watersheds U.S. Environmental Protection Agency
>>>>>>>>> 1200 Pennsylvania Ave., NW, mailcode 4502T Washington, DC
>>>>>>>>> 20460
>>>>>>>>> (202) 566-1290
>>>>>>>>> eisenberg.mindy@epa.gov
>>>>>>>>>
>>>>>>>>> -----Original Message-----
>>>>>>>>> From: Campbell, Ann
>>>>>>>>> Sent: Friday, March 24, 2017 3:36 PM
>>>>>>>>> To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen,
>>>>>>>>> Damaris <Christensen.Damaris@epa.gov>; Kwok, Rose
>>>>>>>>> <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>
>>>>>>>>> Cc: Goodin, John <Goodin.John@epa.gov>; Peck, Gregory
>>>>>>>>> <Peck.Gregory@epa.gov>
>>>>>>>>> Subject: WOTUS follow up
>>>>>>>>>
>>>>>>>>> Folks, we need to follow up with Sarah and get her copies (e and hard) of the 2015 rule text, the preamble, and the connectivity report.
>>>>>>>>>

Deliberative Process / Ex. 5

>>>>>>>>> Thanks!
>>>>>>>>> Ann

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Wendelowski, Karyn[wendelowski.karyn@epa.gov]
Cc: Kwok, Rose[Kwok.Rose@epa.gov]
From: Christensen, Damaris
Sent: Sat 3/25/2017 4:14:19 AM
Subject: RE: WOTUS follow up

Deliberative Process / Ex. 5

Essay 15
Several commenters assert that the agency should not look to Justice Kennedy's concurring opinion in Rapanos as a legal basis for establishing the scope of waters of the United States. Other commenters assert that the final rule is inconsistent with Justice Scalia's opinion in Rapanos.
The agencies believe the rule is appropriately premised on the significant nexus standard as articulated by Justice Kennedy. The four dissenting Justices in Rapanos, who would have affirmed the court of appeals' application of the agencies' regulation, also concluded that the term "'waters of the United States' encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy." Id. at 810 & n.14 (Stevens, J., dissenting). Neither the plurality nor the Kennedy opinion invalidated any of the current regulatory provisions defining "waters of the United States." As set forth in greater detail in the Technical Support Document, all U.S. Courts of Appeal and virtually all U.S. District Courts that have applied Rapanos have held that Justice Kennedy's standard may be applied to identify jurisdictional waters.

Issue: Legality of Asserting Jurisdiction over Ephemeral Waters
A number of commenters questioned the agencies' legal ability to assert jurisdiction over ephemeral waters. Some observed that Congress did not intend the Clean Water Act (CWA) to regulate ephemeral streams, instead limiting the CWA's jurisdiction to waters and not landscape features which can transmit waters such as dry washes, arroyos, and ephemeral streams. Several commenters noted that Justice Kennedy's opinion in Rapanos called for the agencies to identify categories of jurisdictional tributaries and the volume of flow and other factors taken into consideration. They asserted that considering ephemeral waters as "tributaries" relies on a mere hydrologic connection and not the presence of the significant nexus that Justice Kennedy indicated was the basis for jurisdiction. Other commenters believed that omission of the "relatively permanent" requirement from Justice Scalia's opinion in Rapanos substantially broadens the universe of jurisdictional tributaries, and call for the agencies to incorporate the approach in the 2008 Rapanos Guidance, which indicates tributaries that flow after rainfall are subject to a case-specific significant nexus analysis. Some commenters asserted that Supreme Court precedent requires both the Kennedy and Scalia standards to be met, and only relatively permanent waters with a significant impact are protected.

The final rule concludes that all waters meeting the definition of "tributary" have a significant nexus, regardless of their flow regime, and thus are considered as per se waters of the United States. CWA jurisdiction has historically been asserted over intermittent and ephemeral waters. The longstanding regulatory definition of "waters of the United States" included "tributaries" without any limitations regarding volume or duration of flow. The December 2008 Guidance on post-Rapanos implementation noted that tributaries that flow only in direct response to rainfall are subject to the CWA if they have a significant nexus to a downstream traditional navigable water, and that intermittent or seasonal streams were jurisdictional without the need for a case-specific showing of significant nexus. Federal court decisions, some of which are decades old, have supported assertions that intermittent and ephemeral waters are jurisdictional. See the summary response 8.1 above and 8.1.2 below for further discussion about CWA protection of ephemeral tributaries. The discussion above summarizes the scientific basis for the rule's conclusion that tributaries, as defined, have a significant nexus and thus are "waters of the United States," including tributaries with ephemeral flow. See the Technical Support document for a complete discussion of the legal basis for asserting jurisdiction over ephemeral tributaries, section VII including VII.B.vi, and the appropriateness of applying Justice Kennedy's significant nexus standard to tributaries.

See also the summary responses in Section 9 “Scientific Evidence Supporting the Rule” of the Response to Comments.

9(d) The Science Report and Congressional/Supreme Court Intent
Some commenters were concerned that the assumptions in the draft Science Report were not consistent with the constitutional limits of the Clean Water Act (CWA) or the legal thresholds defined by the Supreme Court. Some commenters were concerned that the Agencies were using the draft Science Report to apply the significant nexus test beyond Kennedy’s intent or to expand categorical jurisdiction beyond what was intended by Scalia. Other commenters raised concerns that Kennedy focused on wetlands as adjacent, not all waters. Some commenters noted that aggregation should also only be applied to wetlands because of Kennedy’s statements. Some commenters felt that because the Science Report does not consider the significance of connections, it is contradictory to Supreme Court direction for a rulemaking. Some commenters stated that the SAB recommendations provided limited support for the Proposed Rule to regulate all Waters of the U.S.

On the other hand, some commenters stated that scientific evidence of connectivity is essential in applying Kennedy’s significant nexus test, and noted that the draft Science Report provides a strong foundation for the proposed definition because it provides more than speculative or insubstantial scientific evidence of connectivity, as required by Kennedy.

Some commenters felt that the basis of the draft Science Report was flawed because it did not focus specifically on the effects to water quality in navigable waters. These commenters felt that without that specific water quality endpoint, connections would not have any relevance to the legal scope of the CWA. These commenters noted that most of the research in the Science Report does not directly and specifically address pollutant transport to and effect on the quality of navigable waters. Commenters felt that studies were irrelevant where they do not establish how connections affect water quality. For example, studies focused on the retention of flood waters are not relevant because they relate to downstream water quantity, not quality.

9(d) Agencies’ Response
While a significant nexus determination is primarily weighted in the scientific evidence and criteria, the agencies also consider the statutory language, the statute’s goals, objectives and policies, the case law, and the agencies’ technical expertise and experience when interpreting the scope of the CWA. For this reason, the SAB was not asked to interpret the language of the Rapanos decision or to make judgments on what waters have a “significant nexus”. Instead, the SAB was asked to review the science underpinning the Science Report, including peer-reviewed literature on water quality functions and the contribution of nutrients, sediment, and contaminants from upstream sources such as streams, wetlands, and open waters. Moreover, the SAB’s September 30, 2014 letter to the Administrator supports the science-based conclusions in the Proposed Rule.

With regard to the commenters’ concern that any effects be tied to the water quality of receiving waters, Congress enacted the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), and this includes, but is not limited to water quality. The Science Report considered the effects of upstream waters on the chemical, physical, and biological integrity of downstream waters. All three elements can significantly influence the quality of downstream waters, not just chemical water quality effects. Peer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands play a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and many other vital chemical, physical, and biological processes in downstream waters. Also, see the Preamble.

-----Original Message-----
From: Eisenberg, Mindy
Sent: Friday, March 24, 2017 8:39 PM
To: Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Cc: Christensen, Damaris <Christensen.Damaris@epa.gov>
Subject: Re: WOTUS follow up

Thanks Karyn! We'll take care of the hard copies but doing a search would be a huge help!
Mindy

Sent from my iPhone

> On Mar 24, 2017, at 6:06 PM, Wendelowski, Karyn <wendelowski.karyn@epa.gov> wrote:
>
> I can send her all those hard copies and I'll do a search [redacted] I'll cc you on whatever I send.
>
> Karyn Wendelowski
> Attorney Advisor
> Office of General Counsel
> (202) 564-5493
>
>> On Mar 24, 2017, at 3:45 PM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:
>>
>> Sigh. Not sure if Rose had time. [redacted]
>>
>> Mindy Eisenberg
>> Acting Director, Wetlands Division
>> Office of Wetlands, Oceans and Watersheds U.S. Environmental
>> Protection Agency
>> 1200 Pennsylvania Ave., NW, mailcode 4502T Washington, DC 20460
>> (202) 566-1290
>> eisenberg.mindy@epa.gov
>>
>> -----Original Message-----
>> From: Campbell, Ann
>> Sent: Friday, March 24, 2017 3:36 PM
>> To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris
>> <Christensen.Damaris@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>;
>> Downing, Donna <Downing.Donna@epa.gov>
>> Cc: Goodin, John <Goodin.John@epa.gov>; Peck, Gregory
>> <Peck.Gregory@epa.gov>
>> Subject: WOTUS follow up
>>
>> Folks, we need to follow up with Sarah and get her copies (e and hard) of the 2015 rule text, the preamble, and the connectivity report.
>>
[redacted]
>> Thanks!
>> Ann

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Hewitt, Julie
Sent: Thur 3/23/2017 4:53:15 PM
Subject: FW: CWR RIA

I saw that Al sent me an email Sunday evening, Personal Matters / Ex. 6
Personal Matters / Ex. 6 , and didn't get back to him till Monday morning.

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

-----Original Message-----
From: Hewitt, Julie
Sent: Monday, March 20, 2017 11:35 AM
To: McGartland, Al <McGartland.Al@epa.gov>
Subject: RE: CWR RIA

Deliberative Process / Ex. 5

From: McGartland, Al
Sent: Monday, March 20, 2017 11:00 AM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: Re: CWR RIA

Deliberative Process / Ex. 5

Sent from my iPhone

> On Mar 20, 2017, at 10:56 AM, Hewitt, Julie <Hewitt.Julie@epa.gov> wrote:
>

Deliberative Process / Ex. 5

>
> -----Original Message-----
> From: McGartland, Al
> Sent: Sunday, March 19, 2017 9:28 PM
> To: Hewitt, Julie <Hewitt.Julie@epa.gov>
> Subject: CWR RIA
>

Deliberative Process / Ex. 5

> Sent from my iPhone

To: Keating, Jim[Keating.Jim@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Doley, Todd[Doley.Todd@epa.gov]
From: Hewitt, Julie
Sent: Thur 3/23/2017 4:50:32 PM
Subject: RE: draft framework
Proposed Framework for Economic Analysis for New WOTUS Proposed Rule v3.docx

Here is the latest version based on mine and Todd's comments (we coordinated). I renamed it to v3. It's set to not show track changes, although they are there if you want to see them. I also marked comments as completed, except for a very small number (my choices may be subjective).

From: Keating, Jim
Sent: Wednesday, March 22, 2017 10:22 AM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>; Doley, Todd <Doley.Todd@epa.gov>
Subject: RE: draft framework

Deliberative Process / Ex. 5

From: Eisenberg, Mindy
Sent: Tuesday, March 21, 2017 9:02 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Keating, Jim <Keating.Jim@epa.gov>; Doley, Todd <Doley.Todd@epa.gov>
Subject: RE: draft framework

I did a little editing and provided some responses to your comments. To the extent that you have edits/additions to the text itself, please feel free -

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thanks much!

Mindy Eisenberg

Acting Director, Wetlands Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

From: Hewitt, Julie
Sent: Tuesday, March 21, 2017 5:49 PM
To: Keating, Jim <Keating.Jim@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Doley, Todd <Doley.Todd@epa.gov>
Subject: RE: draft framework

I dropped some comments on top of Jim's. Need to take a short break, then will call Mindy.

From: Keating, Jim
Sent: Tuesday, March 21, 2017 4:35 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>; Doley, Todd <Doley.Todd@epa.gov>
Subject: RE: draft framework

A couple quick thoughts (see attached)…

From: Eisenberg, Mindy

Sent: Tuesday, March 21, 2017 4:08 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Doley, Todd <Doley.Todd@epa.gov>; Keating, Jim <Keating.Jim@epa.gov>
Subject: draft framework

Hi,

Julie, give me a call when you can and I can explain this a little more.

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thanks!

Mindy

Mindy Eisenberg

Acting Director, Wetlands Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
Cc: Kwok, Rose[Kwok.Rose@epa.gov]; Goodin, John[Goodin.John@epa.gov]; donnadowning@post.harvard.edu[donnadowning@post.harvard.edu]
From: Downing, Donna
Sent: Fri 3/17/2017 7:31:59 PM
Subject: Planning for next week's WOTUS-2 activities
Planning for the week of 20 March.docx

Hi Mindy and Damaris –

Attached is a summary of what's underway regarding WOTUS-2 relevant for next week's activities, when Rose and I are out for much/all of the week. As the summary indicates, Damaris is the JD Team lead next week.

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

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downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Neugeboren, Steven[Neugeboren.Steven@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]; Wendelowski, Karyn[wendelowski.karyn@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Peck, Gregory[Peck.Gregory@epa.gov]; Shapiro, Mike[Shapiro.Mike@epa.gov]
Cc: Campbell, Ann[Campbell.Ann@epa.gov]
From: Downing, Donna
Sent: Fri 3/17/2017 4:54:54 PM
Subject: RESEND OF FINAL DOCUMENTS -- All Materials for the Monday briefing for the Administrator on WOTUS-2

Deliberative Process / Ex. 5

Hi everybody –

FYI, here's a sending of the final-final. This differs from the email of a few minutes ago in that it reflects an additional edit from Mike to Attachment 4. Other documents are unchanged. With the exception of attachment 3 which isn't there yet, these documents also are on the Sharepoint site.

Any questions? Feel free to give me a call. Thanks!

Donna

From: Downing, Donna
Sent: Friday, March 17, 2017 12:52 PM
To: Ann Campbell <Campbell.Ann@epa.gov>
Subject: FOR FORWARDING -- All Materials for the Monday briefing for the Administrator on WOTUS-2

To: Bravo, Antonio[Bravo.Antonio@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
Cc: Fuld, John[Fuld.John@epa.gov]
From: Kwok, Rose
Sent: Wed 3/8/2017 5:48:41 PM
Subject: RE: UPDATE MEDIA INQUIRY - WIRED MAGAZINE RE: The Technologies DL 3-8 12 noon

Deliberative Process / Ex. 5

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I took a stab at filling-in some of the answers in BLUE. Kindly fill-in whatever you can.

NOTE the deadline of NOON. Go ahead and fill-in and submit directly to John Fuld when you're finished.

Thanks.

From: Fuld, John
Sent: Tuesday, March 07, 2017 2:30 PM
To: Bravo, Antonio <Bravo.Antonio@epa.gov>
Subject: UPDATE MEDIA INQUIRY - WIRED MAGAZINE RE: The Technologies DL 3-8 12 noon

Antonio,

Here is one they need the rest of the new information. Please use the example we gave you.

Office of Water

Media Inquiry

Travis Loop

Communications Director-Water

loop.travis@epa.gov

John W. Fuld, Ph.D.

Media Relations Mgr.-Water

fuld.john@epa.gov

DATE: March 7, 2017 (Original March 1st)

OUTLET: WIRED MAGAZINE

REPORTER: Nick Stockton

TOPIC: RE: The Technologies

DEADLINE: Wed. 3-8 12 noon

OW PROGRAM: OWOW

****

For Context – Internal Only {*to be included in addendum*}

Deliberative Process / Ex. 5

- The Clean Water Rule replaced longstanding regulations defining the scope of "waters of the United States" protected by all Clean Water Act (CWA) programs, in response to U.S. Supreme Court decisions and requests for rulemaking from many different stakeholders.
- **The Clean Water Rule was published in the *Federal Register* on June 29, 2015 and became effective on August 28, 2015.**
- As a result of a court-issued nationwide stay **issued on October 9, 2015**, the agencies are currently using the mid-1980s regulatory definition of "waters of the United States."
- The Clean Water Rule has received significant press coverage and Congressional interest.

Public facing information on the Clean Water Rule: **https://www.epa.gov/cleanwaterrule**

The Topic has been the subject of many EPA Press Releases, Press Inquiries, and Congressional responses.

INFORMATION PUBLICLY AVAILABLE: (*LIST SOURCE WITH EACH ANSWER)*

This Webpage is the source for all four answers: **https://www.epa.gov/cleanwaterrule**

WHO APPROVED RESPONSE: *(director sign off on the responses in that office? Who?)*

Deliberative Process / Ex. 5

****

PERTINENT INFORMATION:

He's working on a story about the technologies the EPA and US ACOE use to enforce the Clean Water Act and Waters of the US rule.

QUESTION:

1. I'd like to know about any technologies—remote sensing, satellite imagery, terrain modeling software, hydrology tools, GIS, and so on— the EPA uses to determine whether a body of water falls under the protection of the Clean Water Act.

2. I understand the Wotus rule hasn't yet taken effect, but I'd like to know how it would change, add to, or alter the technologies and parameters that EPA technicians use to delimit a federally regulated waterway.

****

BACKGROUND ON THE ISSUE: *(Complete and Clear)*

PROGRAM MESSAGE AND ANSWERS:

Deliberative Process / Ex. 5

1. I'd like to know about any technologies—remote sensing, satellite imagery, terrain

modeling software, hydrology tools, GIS, and so on— the EPA uses to determine whether a body of water falls under the protection of the Clean Water Act.

Response:

This question is now modified by the new question 4 below.

2. I understand the Wotus rule hasn't yet taken effect, but I'd like to know how it would change, add to, or alter the technologies and parameters that EPA technicians use to delimit a federally regulated waterway.

Response:

The Clean Water Rule became effective on August 28, 2015. On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the Clean Water Rule nationwide pending further action of the court. In response to this decision, EPA and the Department of Army resumed nationwide use of the agencies' prior regulations defining the term "waters of the United States."

On February 28, 2017, President Trump issued an Executive Order directing the Administrator of the EPA and the Assistant Secretary of the Army for Civil Works to review the Clean Water Rule and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law (https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic). EPA and the Army subsequently signed a joint Notice of Intention to Review and Rescind or Revise the Clean Water Rule (https://www.epa.gov/cleanwaterrule/notice-intention-review-and-rescind-or-revise-clean-water-rule).

3. **I would love to talk to (hear from) a software analyst about their workflow on these.**

Response:

EPA does not have a software analyst.

4. Just following up, with some amending to my questions. I just spoke with some folks at the Army Corps who explained to me the technology they use for jurisdictional determination. They mentioned that they (or a regional ACE subsidiary) do most of the JD's, and the EPA steps in for certain types of decisions, called "significant nexus analysis" and "isolated waters." They also mentioned that the EPA occasionally steps in to make decisions on whatever they determine is a "special case."

First, I just want to fact check to make sure that my understanding of the workflow between the ACE and EPA is correct.

<u>Second</u>, I'm interested to learn more about the cases the EPA steps in on. Does the EPA use its own mapping tools to determine the JD, or does it do its analysis using the ACE's data?

<u>Finally,</u> I'm interested to learn what kinds of attributes trigger the EPA to determine to determine a given JD is a "special case" (that is, besides the significant nexus and isolated waters cases mentioned above) and requires them to step in.

Response:

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28jan08.pdf

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

John W. Fuld, Ph.D.

Media Relations Manager-Water
Environmental Protection Agency

1200 Constitution Ave

Washington DC 20460

Office: 202-564-8847

Cell: 202-815-6408

Fuld.john@epa.gov

To: Reid, Darren[Reid.Darren@epa.gov]
Cc: Goodin, John[Goodin.John@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Downing, Donna
Sent: Fri 3/3/2017 7:39:32 PM
Subject: For printing and giving to John G.: background documents on WUS
1979_Civiletti_Memorandum.pdf
December 2008 Rapanos Guidance.pdf
Presidential Executive Order on CWR.htm
Rapanos 2006.rtf
SWANCC opinion.doc
40 CFR 230.3.doc
CWA section 502 - def navigable waters.doc
CWA section 502 - def navigable waters.doc
CWR Rule Text.docx
Rapanos 2006.rtf

Hi Darren –

John asked that I forward to you several background documents related to the new "waters of the US" rulemaking, for printing and perhaps putting in a small binder for his use. Attached are several of those documents (more forthcoming when I have electronic copies).

I'm cc'ing John and Mindy in case they have need of the documents in electronic form.

Please let me know if Outlook does something strange with the attachments.

Thanks!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Downing, Donna
Sent: Wed 3/1/2017 10:19:22 PM
Subject: FW: For discussion at Th 10am Wetlands General meeting: draft schedule for revised "waters of the US" proposed reg to OMB
Rulemaking steps and timelines v1.docx
Rule Timeline short v1.xlsx

Deliberative Process / Ex. 5

We live in exciting times.

Hope your trip is going well.

■· Donna

From: Downing, Donna
Sent: Wednesday, March 01, 2017 5:13 PM
To: Shapiro, Mike <Shapiro.Mike@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Loop, Travis <Loop.Travis@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Rose Kwok <Kwok.Rose@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Karyn Wendelowski <wendelowski.karyn@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Ann Campbell <Campbell.Ann@epa.gov>; Orvin, Chris <Orvin.Chris@epa.gov>; FertikEdgerton, Rachel <FertikEdgerton.Rachel@epa.gov>; Frithsen, Jeff <Frithsen.Jeff@epa.gov>; Nickerson, William <Nickerson.William@epa.gov>
Cc: McDavit, Michael W. <Mcdavit.Michael@epa.gov>
Subject: For discussion at Th 10am Wetlands General meeting: draft schedule for revised "waters of the US" proposed reg to OMB

Hi everybody:

Deliberative Process / Ex. 5

See you tomorrow!

Donna

Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

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Washington, DC 20004

To: Nandi, Romell[Nandi.Romell@epa.gov]
Cc: Downing, Donna[Downing.Donna@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]; Able, Tony[Able.Tony@epa.gov]; Auerbach, Daniel[Auerbach.Daniel@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Christensen, Damaris
Sent: Wed 2/8/2017 3:01:55 PM
Subject: RE: OWOW topics identified for OW AA nominee briefing book - FACTS SHEETS NEEDED by 10am on Wed, Feb. 8
Confirmation Hearing Factsheet CWR- 02-08-17.docx

Hey Romell – Here's the Clean Water Rule factsheet for John's review.

Deliberative Process / Ex. 5

Damaris

From: Able, Tony
Sent: Friday, February 03, 2017 1:47 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>
Cc: Downing, Donna <Downing.Donna@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>
Subject: RE: OWOW topics identified for OW AA nominee briefing book - FACTS SHEETS NEEDED by 10am on Wed, Feb. 8

No PPTs for this. It is the sheet that will go into their briefing book for the prep for congressional hearings

Tony Able, Acting Chief

Wetlands and Aquatic Resources Regulatory Branch

Wetlands Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

202 566 0375 (Phone)

404 821 9066 (Cell)

From: Christensen, Damaris
Sent: Friday, February 03, 2017 1:34 PM
To: Able, Tony <Able.Tony@epa.gov>
Cc: Downing, Donna <Downing.Donna@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>
Subject: Re: OWOW topics identified for OW AA nominee briefing book - FACTS SHEETS NEEDED by 10am on Wed, Feb. 8

I can work on a draft to circulate by Monday morning- unless Someone else wants to take the first stab. I'd been working to pull together PowerPoint slides. Is that replaced by this?

Damaris

Sent from my iPhone

On Feb 3, 2017, at 1:23 PM, Able, Tony <Able.Tony@epa.gov> wrote:

> Team Leads and others: See below the briefing papers we need to pull together for the
>
> Tony Able, Acting Chief
>
> Wetlands and Aquatic Resources Regulatory Branch
>
> Wetlands Division
>
> Office of Wetlands, Oceans and Watersheds
>
> U.S. Environmental Protection Agency
>
> 1200 Pennsylvania Ave., NW, mailcode 4502T
>
> Washington, DC 20460

202 566 0375 (Phone)

404 821 9066 (Cell)

From: Eisenberg, Mindy
Sent: Friday, February 03, 2017 12:26 PM
To: Able, Tony <Able.Tony@epa.gov>
Subject: FW: OWOW topics identified for OW AA nominee briefing book - FACTS SHEETS NEEDED by 10am on Wed, Feb. 8
Importance: High

Hi Tony,

Please work with your staff and send me the drafts by COB Tuesday.

Thanks!

Mindy Eisenberg

Acting Director, Wetlands Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

From: Nandi, Romell
Sent: Friday, February 03, 2017 12:16 PM

To: OWOW Managers Group <OWOW_Managers_Group@epa.gov>
Subject: OWOW topics identified for OW AA nominee briefing book - FACTS SHEETS NEEDED by 10am on Wed, Feb. 8
Importance: High

OWOW Managers:

The OWOW topics below, from the original potential topic list we submitted to OW, **have been identified as needing fact sheets** for the OW AA nominee's briefing book:

404 program implementation
Clean Water Rule Status
Bristol Bay and use of 404(c)
Deepwater Horizon Oil Spill Natural Resource Restoration Activities
Section 319 grants (including Oregon CZARA)
Nutrients and the Hypoxia Task Force
National Estuary program and the new grant provision
Long Island Sound Nitrogen Strategy and LIS Disposal Site Designation Rule
Lake Champlain TMDL Implementation
Chesapeake Bay TMDL Implementation
MI and OH 303(d) lists (Lake Erie)
WV Ionic Toxicity TMDL litigation
MO nutrient TMDL lawsuits

Attached is a Word template for how the fact sheet should look (using HABs as an example) – please look at it closely.

A few general comments:

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

I will be sending the draft fact sheets to John as soon as I get them for his review. Although I am asking for these **no later than 10am on Wednesday the 8th**, obviously if you have them sooner, send them as soon as they are ready since it will allow John more time to review and for us to edit as needed.

Thanks.

Romell

566-1203

<Confirmation Hearing Factsheet Example - 02-01-17.docx>

To: Downing, Donna[Downing.Donna@epa.gov]; Able, Tony[Able.Tony@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
Cc: Evans, David[Evans.David@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Auerbach, Daniel
Sent: Tue 1/24/2017 6:54:54 PM
Subject: RE: FYI -- Comparison of key bills amending the CWA's definition of "waters of the US"
CRS_EPA and Corps Rule to Define WOTUS.pdf
CRS_WOUS_EvolutionR44585.pdf

Deliberative Process / Ex. 5

From: Downing, Donna
Sent: Tuesday, January 24, 2017 12:35 PM
To: Able, Tony <Able.Tony@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Cc: Evans, David <Evans.David@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Auerbach, Daniel <Auerbach.Daniel@epa.gov>
Subject: FYI -- Comparison of key bills amending the CWA's definition of "waters of the US"

Hi Tony, John, and Mindy –

During his confirmation hearing, I understand Administrator-Designee Pruitt indicated support for amending the Clean Water Act to define "navigable waters" or "waters of the US."

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Attached please find a draft table summarizing two bills introduced in the last Congress:

• S.980, "Defense of Environment and Private Property Act" introduced by Senator Paul, and

•□□□□□□□ S. 1140 as amended, "Federal Water Quality Protection Act," introduced by Senator Barrasso.

Neither bill has been reintroduced in the 115th Congress yet.

Deliberative Process / Ex. 5 **Deliberative Process / Ex. 5**

Please let me know if you have any suggested edits or questions. Thanks!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

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downing.donna@epa.gov

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Delivery Address:

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Washington, DC 20004

To: Able, Tony[Able.Tony@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
Cc: Evans, David[Evans.David@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Auerbach, Daniel[Auerbach.Daniel@epa.gov]
From: Downing, Donna
Sent: Tue 1/24/2017 5:35:20 PM
Subject: FYI -- Comparison of key bills amending the CWA's definition of "waters of the US"
Table comparison S.1140 and S.980 defining waters of US .docx

Hi Tony, John, and Mindy –

During his confirmation hearing, I understand Administrator-Designee Pruitt indicated support for amending the Clean Water Act to define "navigable waters" or "waters of the US." Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Attached please find a draft table summarizing two bills introduced in the last Congress:

- S.980, "Defense of Environment and Private Property Act" introduced by Senator Paul, and

- S. 1140 as amended, "Federal Water Quality Protection Act," introduced by Senator Barrasso.

Neither bill has been reintroduced in the 115th Congress yet.

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Please let me know if you have any suggested edits or questions. Thanks!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

Message

From: Christensen, Damaris [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E04107C23C1043D6967754064C477A29-CHRISTENSEN, DAMARIS]
Sent: 6/12/2017 7:29:26 PM
To: Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]; Klos, Caroline [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ee1938845f7449dfbeb1a41493051068-Klos, Caroline]
CC: Downing, Donna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d853e50d3a2b489daf2cc498c052e3d6-DDowning]; Peterson, Carol [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1a897adcf3ae4e98880f850ac261471c-CPeter04]
Subject: RE: TPs Needed for Tomorrow: Family Farm Alliance
Attachments: WOTUS2 Talking Points 6-12-17.docx

Here are the latest TPs.

Damaris

From: Eisenberg, Mindy
Sent: Monday, June 12, 2017 12:12 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>
Subject: Fwd: TPs Needed for Tomorrow: Family Farm Alliance

Damaris,
Can you send Caroline the basic TPs on Wotus? Reflecting step 1 is coming soon?
Thanks!

Sent from my iPhone

Begin forwarded message:

> **From:** "Klos, Caroline" <Klos.caroline@epa.gov>
> **Date:** June 12, 2017 at 10:55:10 AM EDT
> **To:** OWOW Managers Group <OWOW_Managers_Group@epa.gov>
> **Cc:** "Brown, Sineta" <Brown.Sineta@epa.gov>
> **Subject: RE: TPs Needed for Tomorrow: Family Farm Alliance**
>
> Here is additional information, just in, regarding this request:

To discuss crucial western water policies and issues, including infrastructure, drought, the Endangered Species Act, the Clean Water Act, farm water programs and a new Farm Bill, and other issues that affect western irrigated farms and ranches.

> **From:** Klos, Caroline
> **Sent:** Monday, June 12, 2017 10:44 AM
> **To:** OWOW Managers Group <OWOW_Managers_Group@epa.gov>
> **Subject:** FW: TPs Needed for Tomorrow: Family Farm Alliance

Another request for talking points from the OW IO. They are looking for generic TPs on our work with farming in general. Please see email below and let me know by 1:00 today if you have input. Sorry for the short turnaround, but this just came in :o(

Caroline Mixon Klos
Environmental Protection Agency
Office of Wetlands, Oceans & Watersheds
Office: 202-564-3029 room 7417D West
Telework: Personal Phone / Ex. 6

From: Campbell, Ann
Sent: Monday, June 12, 2017 10:40 AM
To: Farris, Erika D. <Farris.Erika@epa.gov>; Klos, Caroline <Klos.caroline@epa.gov>; Crawford, Tiffany <Crawford.Tiffany@epa.gov>
Cc: Gonzalez, Yvonne V. <Gonzalez.Yvonne@epa.gov>; Ruf, Christine <Ruf.Christine@epa.gov>; Lousberg, Macara <Lousberg.Macara@epa.gov>; Thomas, Latosha <Thomas.Latosha@epa.gov>
Subject: TPs Needed for Tomorrow: Family Farm Alliance

Folks, this got set up late last week. I'm still trying to narrow the conversation down and get specifics but this is what I have so far. Would be great if folks could offer some generic TPs on our work with farming in general (which I think we have from the agri womens meeting), water infrastructure, and WOTUS. I will compile, unless someone wants to volunteer! ☺

Family Farm Alliance
Clinton North Room 5530

6/13/2017 1:00 PM
6/13/2017 2:00 PM

e: (none)

tatus: Accepted

Brennan, Thomas
Attendees: Brennan, Thomas; Shapiro, Mike; Keigwin, Richard; Konkus, John
Attendees: Graham, Amy; Carroll, Carly; Best-Wong, Benita; Law, Darci; Healey, Emily; Johnson, Anna

Ten members of the Family Farm Alliance will be in DC and would like to meet with EPA. They want to discuss water policy, water infrastructure, Clean Water Act, and Endangered Species Act. I have invited John and Amy from OPA, Rick from OPP and Mike from OW.

Message

From: Gorke, Roger [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9A59CE070DA94A4194ECBC2C19756B98-RGORKE]
Sent: 6/8/2017 3:41:56 PM
To: Hurld, Kathy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f3b04131f1145fcb4ccf5b0a64c1ac4-KHurld]; Downing, Donna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d853e50d3a2b489daf2cc498c052e3d6-DDowning]; Christensen, Damaris [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e04107c23c1043d6967754064c477a29-Christensen, Damaris]; Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]
Subject: WGA PPT and phone number
Attachments: federalism WGA ppt 6-8-17.pdf

Sorry for the delay…stupid computer…(and computer user)

Conference ID: Nonresponsive Conference Code/ Ex. 6
Leader Toll-Free Dial-In Number:
Participant Toll Free Dial-In Number: Nonresponsive Conference Code/ Ex. 6

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Cc: Stacey Jensen[Stacey.M.Jensen@usace.army.mil]; Jennifer Moyer[Jennifer.A.Moyer@usace.army.mil]; David.F.Dale@usace.army.mil[David.F.Dale@usace.army.mil]
From: Personal Matters / Ex. 6 CIV USARMY HQDA ASA CW (US)
Sent: Wed 6/7/2017 9:29:58 PM
Subject: Fwd: WOTUS2: Economics Analysis Step 1
Economic Analysis of Proposed WOTUS Step 1.internal review draft.consolidated.clean + Army OGC edits 20170607.docx

Mr Schmauder's edits. **Deliberative Process / Ex. 5**

Thanks Personal Matters / Ex. 6
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>

CLEAN WATER RULE

Issue:

- The Clean Water Rule replaced longstanding regulations defining the scope of "waters of the United States" protected by all Clean Water Act (CWA) programs, in response to U.S. Supreme Court decisions and requests for rulemaking from many different stakeholders.
- As a result of a court-issued nationwide stay, the agencies are currently using the mid-1980s regulatory definition of "waters of the United States."
- The Clean Water Rule has received significant press coverage and Congressional interest.

Talking Points:

- EPA and the U.S. Army Corps of Engineers finalized the Clean Water Rule to clarify those waters covered by the CWA.
- The Court of Appeals for the Sixth Circuit issued a nationwide stay on October 9, 2015; EPA and the U.S. Army Corps of Engineers will continue to implement regulations defining Clean Water Act jurisdiction as they did prior to the Rule's effective date.
- The U.S. Supreme Court granted *certiori* in early 2017 to decide which court has jurisdiction over the merits of the case.

Background:

- The definition of "waters of the United States" applies to all Clean Water Act programs. Congress left it up to the agencies to define this term.
- The Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*) (2001) and *Rapanos v. United States* (2006) created considerable confusion regarding the scope of CWA jurisdiction, and a very wide range of stakeholders called for rulemaking to increase clarity.
- Despite the confusion, the legislative history and Supreme Court decisions clearly extend CWA jurisdiction beyond navigable-in-fact waters.
- The Clean Water Rule:
    - Identifies waters that are "waters of the United States."
    - Identifies waters that are excluded from jurisdiction, and
    - Provides several definitions, including for the first time a definition of "tributary."
- More than 1,200 peer-reviewed, published scientific studies support the rule's conclusion that tributaries, adjacent waters, and impoundments as defined have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas, and that other waters may be shown to have such a nexus.
- The Science Advisory Board commented on both the Science Report and the proposed rule, concluding that the inclusion of waters within the proposed rule was supported by available science and that the agencies could have protected yet more waters.
- The CWR reflects longstanding agency practice (such as applying to intermittent and ephemeral streams) and responds to public comments (such as by excluding certain stormwater systems)
- The rule was finalized after consideration of over 1 million public comments on the proposed rule, and over 400 meetings with interested stakeholder groups. It was signed on May 27, 2015, published in the *Federal Register* on June 29, 2015, and was effective August 28, 2015.
- The rule is being litigated by the regulated community, states, and environmental groups as both

too comprehensive and too limited.

EPA and the Army Corps' Rule to Define "Waters of the United States"

Claudia Copeland
Specialist in Resources and Environmental Policy

December 3, 2015

Congressional Research Service
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www.crs.gov
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CRS REPORT
Prepared for Members and
Committees of Congress

Summary

On May 27, the Environmental Protection Agency (EPA) and the U.S.Army Corps of Engineers (Corps) jointly announced a final rule defining the scope of waters protected under the Clean Water Act (CWA). The rule revises regulations that have been in place for more than 25 years. Revisions are being made in light of 2001 and 2006 Supreme Court rulings that interpreted the regulatory scope of the CWA more narrowly than the agencies and lower courts were then doing, and created uncertainty about the appropriate scope of waters protected under the CWA.

According to the agencies, the new rule revises the existing administrative definition of "waters of the United States" consistent with the CWA, legal rulings, the agencies' expertise and experience, and science concerning the interconnectedness of tributaries, wetlands, and other waters and effects of these connections on the chemical, physical, and biological integrity of downstream waters. Waters that are "jurisdictional" are subject to the multiple regulatory requirements of the CWA. Non-jurisdictional waters are not subject to those requirements.

This report describes the final revised rule—which the agencies refer to as the Clean Water Rule—and includes a table comparing the existing regulatory language that defines "waters of the United States" with the revisions. The rule is particularly focused on clarifying the regulatory status of surface waters located in isolated places in a landscape. It does not modify some categories of waters that are jurisdictional under existing rules (traditional navigable waters, interstate waters and wetlands, the territorial seas, and impoundments). The rule also lists waters that would not be jurisdictional, such as prior converted cropland and certain ditches. It makes no change to existing statutory exclusions, such as CWA permit exemptions for normal farming and ranching activities. The rule will replace EPA-Corps guidance that was issued in 2003 and 2008, which has guided agency interpretation of the Court's rulings but also has caused considerable confusion. Much of the controversy since the Supreme Court rulings has focused on the degree to which isolated waters and small streams are jurisdictional. Under the EPA-Corps guidance, many of these waters have required case-specific evaluation to determine if jurisdiction applies. Under the final rule, some of these waters would continue to need case-specific review, but fewer than under the existing agency guidance documents. The final rule also explicitly excludes specified waters from the definition of "waters of the United States" (e.g., prior converted croplands, stormwater management systems, and groundwater).

Changes in the final rule would increase the *categorical* assertion of CWA jurisdiction, in part as a result of expressly declaring some types of waters jurisdictional by rule (such as all waters adjacent to a jurisdictional water), making these waters subject to the act's permit and other requirements if pollutant discharges occur. Nevertheless, the agencies believe that the rule does not exceed the CWA's lawful coverage or protect new types of waters that have not been protected historically (i.e., under existing rules that the new rule will replace). While it would enlarge jurisdiction beyond that under the existing EPA-Corps guidance, they believe that it would not enlarge jurisdiction beyond what is consistent with the Supreme Court's current reading of jurisdiction and would reduce jurisdiction over some waters, as a result of exclusions and exemptions. The agencies estimate that the new rule will result in approximately 3-5% more positive assertions of jurisdiction over U.S. waters, compared with current field practice.

Congressional interest in the rule has been strong since it was proposed in 2014 and is continuing in the 114th Congress. The agencies contend that the final rule responds to those criticisms of the proposed rule. Their stated intention has been to clarify the rules and make jurisdictional determinations more predictable, less ambiguous, and more timely. Some stakeholders believe that the agencies largely succeeded in that objective, while others do not. Challenges to the rule were filed in multiple federal district and appellate courts by industry groups, more than half of

the states, and several environmental groups. The rule became effective on August 28, 2015, but on October 9, a federal court blocked the rule's implementation nationwide.

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Introduction

On May 27, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly announced a final rule defining the scope of waters protected under the Clean Water Act (CWA). The rule would revise regulations that have been in place for more than 25 years.[1] Revisions were proposed in March 2014 in light of Supreme Court rulings in 2001 and 2006 that interpreted the regulatory scope of the CWA more narrowly than the agencies and lower courts were then doing, and created uncertainty about the appropriate scope of waters protected under the CWA.[2]

In April 2011, EPA and the Corps proposed guidance on policies for determining CWA jurisdiction to replace guidance previously issued in 2003 and 2008; all were intended to lessen confusion over the Court's rulings for the regulated community, regulators, and the general public. The guidance documents sought to identify, in light of the Court's rulings, categories of waters that remain jurisdictional, categories not jurisdictional, and categories that require a case-specific analysis to determine if CWA jurisdiction applies. The 2011 proposed guidance identified similar categories as in the 2003 and 2008 documents, but it would have narrowed categories that require case-specific analysis in favor of asserting jurisdiction categorically for some types of waters. The new rule will replace the existing 2003 and 2008 guidance, which had remained in effect because the 2011 proposed guidance was not finalized.[3]

The 2011 proposed guidance was extremely controversial, especially with groups representing property owners, land developers, and the agriculture sector, who contended that it represented a massive federal overreach beyond the agencies' statutory authority. Most state and local officials were supportive of clarifying the extent of CWA-regulated waters, but some were concerned that expanding the CWA's scope could impose costs on states and localities as their own actions (e.g., transportation projects) become subject to new requirements. Most environmental advocacy groups welcomed the proposed guidance, which would more clearly define U.S. waters that are subject to CWA protections,but some in these groups favored even a stronger document. Still, both supporters and critics of the 2011 proposed guidance urged the agencies to replace guidance, which is non-binding and not subject to full notice-and-comment rulemaking procedures, with revised regulations that define "waters of the United States." Three opinions in the 2006 Supreme Court *Rapanos* ruling similarly urged the agencies to initiate a rulemaking, as they did subsequently.

In the 112th and 113th Congresses, a number of legislative proposals were introduced to bar EPA and the Corps from implementing the 2011 proposed guidance or developing regulations based on it; none of these proposals was enacted. Similar criticism followed almost immediately after release of the proposed rule on March 25, 2014, with some Members asserting that it would result in job losses and damage economic growth. Supporters of the Administration, on the other hand, defended the agencies' efforts to protect U.S. waters and reduce frustration that has resulted from

[1] Definition of "waters of the United States" is found at 33 C.F.R. §328.3 (Corps) and 40 C.F.R. §122.2 (EPA). The term is similarly defined in other EPA regulations, as is the term "navigable waters." It is not defined in the CWA. See **Table 1**.

[2] Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC), 531 U.S. 159 (2001), and Rapanos v. United States, 547 U.S. 715 (2006).

[3] For background on the Supreme Court rulings, subsequent guidance, and other developments, see CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Robert Meltz and Claudia Copeland.

the unclear jurisdiction of the act.[4] Support was expressed by environmental and conservation organizations, among others.[5]

The CWA and the Revised Rule

The proposed rule was published in the *Federal Register* on April 21, 2014.[6] The revised rule became effective August 28, 2015, 60 days after publication in the *Federal Register*.[7] Judicial review of the rule began on July 13, 2015,[8] but legal challenges were filed in multiple federal courts even before that date, and on October 9, a federal court issued an order to stay implementation of the rule nationwide, pending further developments (see "Recent Developments"). **Table 1** in this report provides a comparison of the existing regulatory language promulgated in 1986 that defines "waters of the United States" with language in the proposed rule and the final rule.

The CWA protects "navigable waters," a term defined in the act to mean "the waters of the United States, including the territorial seas."[9] Waters need not be truly navigable to be subject to CWA jurisdiction. Both the legislative history and the case law surrounding the CWA confirm that jurisdiction is not limited to traditional navigable waters, that is, waters that are, were, or could be used in interstate or foreign commerce.[10] Waters that are jurisdictional are subject to the multiple regulatory requirements of the CWA: standards, discharge limitations, permits, and enforcement. Non-jurisdictional waters, in contrast, are not subject to these federal legal requirements. The act's single definition of "navigable waters" applies to the entire law. In particular, it applies to federal prohibition on discharges of pollutants except in compliance with the act's requirements (§301), requirements for point sources to obtain a permit prior to discharge (§§402 and 404), water quality standards and measures to attain them (§303), oil spill liability and oil spill prevention and control measures (§311), certification that federally permitted activities comply with state water quality standards (§401), and enforcement (§309). It impacts the Oil Pollution Act and other environmental laws, as well.[11] The CWA leaves it to the agencies to define the term "waters of the United States" in regulations, which EPA and the Corps have done several times, most recently in 1986.

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[4] Anthony Adragna and Amena Saiyid, "Republicans Contend EPA Overreached on Clean Water Act Jurisdiction Proposal," *Daily Environment Report*, vol. 58 (March 26, 2014), p. A-7.

[5] U.S. Environmental Protection Agency, "Here's What They're Saying About the Clean Water Act Proposed Rule," press release, March 26, 2014, http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/3f954c179cf0720985257ca7004920fa.

[6] Department of Defense, Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Definition of 'Waters of the United States' Under the Clean Water Act, Proposed Rule," 79 *Federal Register* 22188-22274, April 21, 2014. The agencies extended the original 90-day comment period twice for a total of 207 days.

[7] Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Clean Water Rule: Definition of 'Waters of the United States,' Final Rule," 80 *Federal Register* 37054-37127, June 29, 2015. Hereinafter, Final Rule. Documents related to the rule on the EPA website include an economic analysis of the Clean Water Rule and a technical support document; see http://www2.epa.gov/cleanwaterrule/documents-related-clean-water-rule.

[8] See 40 C.F.R. §23.2.

[9] CWA §502(7); 33 U.S.C. §1362(7).

[10] United States v. Riverside Bayview Homes, Inc., 474 U.S. §121, 133 (1985).

[11] For example, the reach of the Endangered Species Act (ESA) is affected, because that act's requirement for consultation by federal agencies over impacts on threatened or endangered species is triggered through the issuance of federal permits.

According to the agencies, the new rule—which they now refer to as the Clean Water Rule—revises the existing administrative definition of "waters of the United States" in regulations consistent with legal rulings—especially the recent Supreme Court cases—and science concerning the interconnectedness of tributaries, wetlands, and other waters to downstream waters and effects of these connections on the chemical, physical, and biological integrity of downstream waters. The agencies assert that the rule also reflects their expertise and experience in administering the CWA, including making more than 120,000 case-specific jurisdictional determinations since 2008. The rule is particularly focused on clarifying the regulatory status of surface waters located in isolated places in a landscape (the types of waters with ambiguous jurisdictional status following the Supreme Court's 2001 ruling in *SWANCC*) and small streams, rivers that flow for part of the year, and nearby wetlands (the types of waters affected by the Court's 2006 ruling in *Rapanos*).

In developing the rule, EPA and the Corps relied on a synthesis prepared by EPA's Office of Research and Development of more than 1,200 published and peer-reviewed scientific reports; the synthesis discusses the current scientific understanding of the connections or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans. The purpose of the scientific synthesis report was to summarize current understanding of these connections, the factors that influence them, and the mechanisms by which connected waters affect the function or condition of downstream waters. The document was reviewed by EPA's Science Advisory Board (SAB), which provides independent engineering and scientific advice to the agency and which completed its review in October 2014. A number of EPA's critics suggested that the agencies should have deferred developing or proposing a rule until a final scientific review document was complete. Some also expressed concern that the final report would not be available during the public comment period on the rule, which closed on November 14, 2014. Based on completion of the SAB review, EPA issued a final scientific assessment report in January 2015, saying that it would assist the agencies in developing the final rule. (See the **Appendix** for discussion of the connectivity report.)

A key conclusion in the science report that was also emphasized by the SAB review is that streams and wetlands fall along a gradient of connectivity that can be described in terms of frequency; duration; magnitude; timing; and rates of change of water, material, and biotic fluxes to downstream waters. However, science cannot in all cases provide "bright lines" to interpret and implement policy. In the preamble to the final rule, EPA and the Corps acknowledge this point.

> ... the agencies' interpretive task in this rule ... requires scientific and policy judgment, as well as legal interpretation. The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during a period of over 40 years. In addition, the agencies are guided, in part, by the compelling need for clearer, more consistent, and easily implementable standards to govern the administration of the Act, including brighter line boundaries where feasible and appropriate.[12]

[12] Final Rule, p. 37057.

Overview of the Revised Rule

The final rule announced on May 27 retains much of the structure of the agencies' existing definition of "waters of the United States." Like the 2003 and 2008 guidance and the 2014 proposal, it identifies categories of waters that are and are not jurisdictional, as well as categories of waters that require a case-specific evaluation. The final rule revises parts of the 2014 proposed rule; the text box, below, lists the key changes in the final rule. **Figure 1** illustrates waters that are jurisdictional by rule and waters that may be determined to be jurisdictional based on case-specific analysis.

Key Changes in the Final Rule from the Proposed Rule

In the preamble to the final rule, EPA and the Corps observe that—

> many ... commenters and stakeholders urged EPA to improve upon the April 2014 proposal, by providing more bright line boundaries and simplifying definitions that identify waters that are p rotected under the CWA, all for the purpose of minimizing delays and costs, making protection of clean water more effective, and improving predictability and consistency for landowners and regulated entities. (Final Rule, p. 37057)

To that end, the final rule revises parts of the proposal.

- Adjacent waters—the final rule establishes distance limits, based on waters that are defined as "neighboring," which is an aspect of "adjacent."
- Tributaries—the final rule removes wetlands and other waters that typically lack a bed and bank and an ordinary high water mark from the definition of "tributary" and moves such waters to "adjacent waters."
- The final rule identifies two sets of waters for purposes of conducting a case-specific significant nexus analysis to determine if CWA jurisdiction applies, narrowing the scope of waters that could be assessed under a case-specific significant nexus analysis compared with the proposed rule. First are five specific subcategories of waters (prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands). Second are waters located in whole or in part within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and within 4,000 feet of the high tide line or ordinary high water mark of a jurisdictional water.
- The final rule redefines excluded ditches.
- The final rule refines proposed exclusions (e.g., artificial lakes and ponds, certain water-filled depressions).
- The final rule adds exclusions for features that were not previously excluded (e.g., stormwater management structures and systems, water distributary and wastewater recycling structures, groundwater recharge basins, puddles).

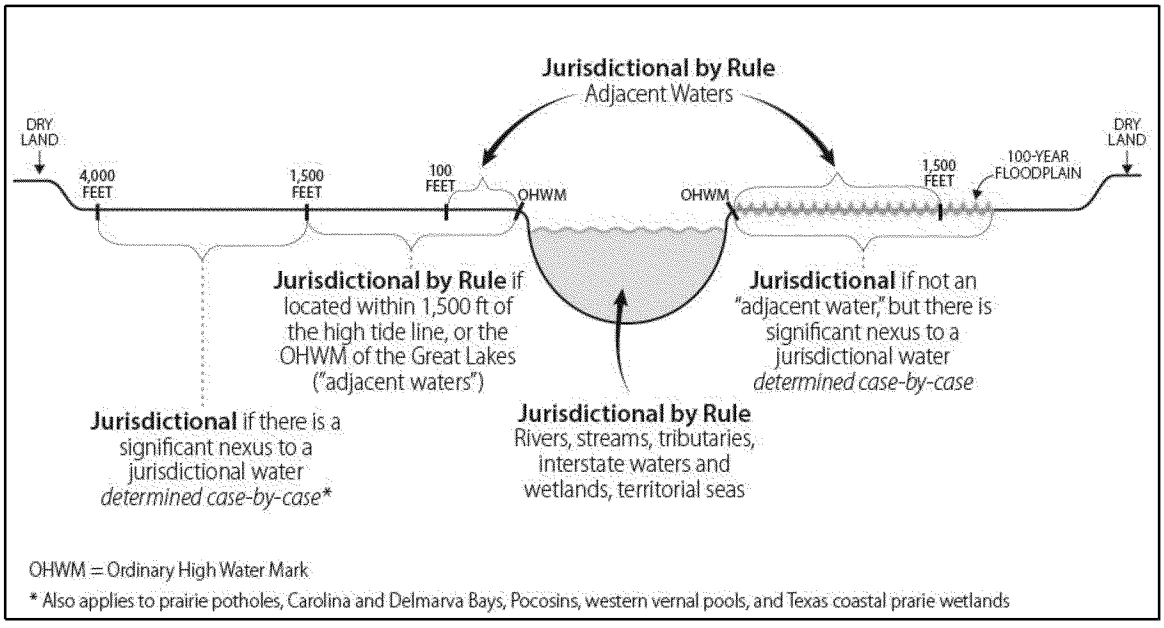
Waters That Are Categorically Jurisdictional

Under the first section of the revised regulation, the following six categories of waters would be jurisdictional by rule without additional or case-specific analysis:

- Waters susceptible to interstate commerce, known as traditional navigable waters (no change from existing rules or the 2014 proposal);
- All interstate waters, including interstate wetlands (no change from existing rules or the 2014 proposal);
- The territorial seas (no change from existing rules or 2014 the proposal);

Figure 1. Jurisdictional Waters under the Final Clean Water Rule

(Not drawn to scale)



Source: Prepared by CRS, from Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Clean Water Rule: Definition of 'Waters of the United States,' Final Rule," 80 *Federal Register* 37054-37127, June 29, 2015.

Notes: "Jurisdictional by Rule" waters are jurisdictional *per se* without case-specific analysis. Other waters in this figure may be jurisdictional if there is a significant nexus to a jurisdictional downstream water. See text for discussion.

- Tributaries of the above waters if they meet the definition of "tributary" (these waters are jurisdictional under existing rules, but the term "tributary" is newly defined in the proposed and final rule);
- Impoundments of the above waters or a tributary, as defined in the rule (no change from existing rules or the 2014 proposal); and
- All waters, including wetlands, ponds, lakes, oxbows, and similar waters, that are adjacent to a water identified in the above categories (these are considered jurisdictional under the final rule because the agencies conclude that they have a significant nexus to a traditional navigable water, interstate water, or the territorial seas; the final rule provides a revised definition that for the first time sets limits on what will be considered "adjacent").

The concept of significant nexus is critical because courts have ruled that, to establish CWA jurisdiction of waters, there needs to be "some measure of the significance of the connection for downstream water quality," as Justice Kennedy stated in the 2006 *Rapanos* case. He said, "Mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."[13] However, as EPA and the Corps observed in the proposed and final rules, significant nexus is not itself a scientific term, but rather a determination made by the agencies in light of the law, science, and the agencies' experience and expertise. Functions that might

[13] 547 U.S. at 784-785.

demonstrate significant nexus include sediment trapping and retention of flood waters. In the rule, the agencies note that a hydrologic connection is not necessary to demonstrate significant nexus, because the function may be demonstrated even in the absence of a connection (e.g., pollutant trapping is another such function).

In the final rule, the agencies responded to comments that had requested some limits on the definition of adjacent waters. Under the rule, a water that is adjacent to a jurisdictional water is itself jurisdictional if it meets the related definition of "neighboring" (see **Table 1**). The final rule establishes maximum distances, or specific boundaries from jurisdictional waters, for purposes of defining "neighboring:"

1. all waters located in whole or in part within 100 feet of the ordinary high water mark (OHWM)[14] of a jurisdictional water;
2. all waters located in whole or in part within the 100-year floodplain[15] that are not more than 1,500 feet from the OHWM of a jurisdictional water;
3. all waters located in whole or in part within 1,500 feet of the high tide line of a jurisdictional water and within 1,500 feet of the OHWM of the Great Lakes.

The entire water is "neighboring" if a portion of it is located within these defined boundaries. Also, for purposes of adjacency, an open water such as a pond includes any wetlands within or abutting its ordinary high water mark.

Under existing regulations, tributaries have been jurisdictional without qualification and were not defined. In the final rule, a tributary can be natural or constructed, but it must have both a bed and bank[16] and ordinary high water mark to be categorically jurisdictional. A tributary as definedby the rule does not lose its jurisdictional status even if there is one or more natural breaks (e.g., a debris pile) or constructed/man-made breaks (e.g., a bridge or dam).

Waters Requiring Significant Nexus Analysis

Beyond the categories of waters that would be categorically jurisdictional under the rule are waters that will be jurisdictional based on a determination that there is a significant nexus to a jurisdictional downstream water. Under existing rules, the regulatory term "other waters" applies to wetlands and non-wetland waters that do not fall into the category of waters that are susceptible to interstate commerce (traditional navigable waters), interstate waters, the territorial seas, tributaries, or waters adjacent to waters in one of these four categories. Existing regulations contain a non-exclusive list of "other waters," such as intrastate lakes, mudflats, prairie potholes, and playa lakes (see **Table 1**). Headwaters, which constitute most "other waters," supply most of the water to downstream traditional navigable waters, interstate waters, and the territorial seas.

EPA and the Corps recognize that the Supreme Court decisions in *SWANCC* and *Rapanos* put limitations on the scope of waters that may be determined to be jurisdictional under the CWA. Much of the controversy since the Court's rulings has focused on uncertainty as to what degree "other waters" are jurisdictional, either by definition/rule, or as determined on a case-by-case basis to evaluate significant nexus to a jurisdictional water. In his opinion in the *Rapanos* case,

[14] Ordinary high water mark (OHWM) generally defines the lateral limits of a water. The term is defined in the final rule; see **Table 1**.

[15] The 100-year floodplain is the land that is predicted to flood during a 100-year storm, that is, a storm which has a 1% chance of occurring in any given year.

[16] In many tributaries, the bed is that part of the channel below the OHWM, and the banks often extend above the OHWM.

Justice Kennedy concluded that wetlands have the requisite significant nexus to a jurisdictional water if the wetlands "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[17]

Since *SWANCC*, intrastate, non-navigable waterbodies (often referred to as geographically isolated waters) for which the sole basis for asserting jurisdiction is interstate commerce are excluded from jurisdiction, unless Corps and EPA Headquarters jointly approve case-specific assertion of jurisdiction. Under the 2003 and 2008 guidance, which will be replaced by the new rule, all other "other waters" have required a case-by-case evaluation to determine if a significant nexus exists, thus providing a finding of CWA jurisdiction. There likewise has been uncertainty as to what degree "other waters" that are not excluded from jurisdiction are similarly situated and thus may be aggregated or combined for a significant nexus determination, as described by Justice Kennedy in *Rapanos*.

In the proposed rule, "other waters," including wetlands, that are adjacent to a jurisdictional water were categorically jurisdictional. Non-adjacent "other waters" and wetlands would continue to require a case-by-case determination of significant nexus. Also, the proposed rule allowed broader aggregation of "other waters" that are similarly situated than under the existing guidance,[18] which could result in more "other waters" being found to be jurisdictional following a significant nexus evaluation.

Some in the regulated community urged EPA and the Corps to provide metrics, such as quantifiable flow rates or minimum number of functions for "other waters," to establish a significant nexus to jurisdictional waters. The agencies declined to do so in the proposed rule, saying that absolute standards would not allow sufficient flexibility to account for variability of conditions and the varied functions that different waters provide.

The agencies acknowledged that there may be more than one way to determine which "other waters" are jurisdictional, and they requested comment on alternate approaches, combinations of approaches, scientific and technical data, case law, and other information that would clarify which "other waters" should be considered categorically jurisdictional or following a case-specific significant nexus determination. In addition, they asked for public comment on whether to conclude by rule that certain types of "other waters"—prairie potholes, pocosins, and perhaps other categories of waters—have a significant nexus and are *per se* jurisdictional. These waters would not require a case-by-case analysis.

The final rule no longer refers to "other waters," but it establishes two defined sets of additional waters that will be a "water of the United States" if they are determined to have a significant nexus to a jurisdictional water. Under the rule, only these waters will require case-specific evaluation, as others are either categorically jurisdictional or categorically excluded from jurisdiction.

First are five subcategories of waters previously considered "other waters": prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands. Historically under existing rules (which the new rule will replace), these were "other waters" and were jurisdictional if their use, degradation, or destruction could affect interstate or

[17] 547 U.S. at 780.

[18] Under the proposed rule, "other waters" could be aggregated for a significant nexus determination if they perform similar functions and are located sufficiently close together to be evaluated as a single landscape unit in the same watershed with regard to their effect on a jurisdictional downstream water.

foreign commerce. Since 2008, some waters in these categories (e.g., vernal pools, pocosins) that are adjacent to a tributary system have been subject to case-specific significant nexus evaluation to determine if jurisdiction applies. According to the Corps, broadly speaking, when a significant nexus evaluation has been completed under the 2008 guidance on any type of aquatic resource, a high percentage of those evaluations resulted in a finding of jurisdiction.[19]

In the final rule, based on reviewing the science concerning these types of waters, the agencies concluded that waters within the five subcategories are "similarly situated" in areas of the country where they are located (following Justice Kennedy's opinion). Under the rule, they will be jurisdictional if a significant nexus to downstream waters is found, based on case-specific evaluation in combination with waters from the same subcategory in the same watershed. While these subcategories of waters are not jurisdictional as a class under the final rule—as some environmental advocates would prefer—the rule allows for case-specific analysis that may find them to be a "water of the United States"[20] and is likely to find them jurisdictional in most cases, according to EPA.[21]

The second set of additional waters that require a significant nexus evaluation under the final rule are waters located in whole or in part within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and within 4,000 feet of the high tide line or OHWM of a jurisdictional water. However, because waters located in the 100-year floodplain and within 1,500 feet of the OHWM of a jurisdictional water are "adjacent" under the new rule, they are categorically jurisdictional. Thus, this second set of waters requiring a significant nexus analysis really applies to waters located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas that are between 1,500 feet and 4,000 feet of the OHWM of a jurisdictional water.

As noted previously, one of the agencies' goals in developing the new rule was to clarify its requirements and lessen the number of instances requiring a time-consuming analysis to determine if CWA jurisdiction applies. The final rule provides two specific categories or subcategories of waters that will need a significant nexus evaluation, which is more limited than under current field practice and the existing EPA-Corps guidance documents. Under the final rule, waters other than these two types are either categorically jurisdictional or categorically excluded from jurisdiction.

Exclusions and Definitions

The second section of the final rule excludes specified waters from the definition of "waters of the United States." The listed waters and features are not jurisdictional even if they would otherwise be included within categories that are jurisdictional. The exclusions are:

- Waste treatment systems, including treatment ponds or lagoons that are designed to meet CWA requirements (no substantive change from existing rules or the 2014 proposal);
- Prior converted cropland (no change from existing rules or the 2014 proposal);
- A list of features that have been excluded by long-standing practice and guidance and would now be excluded by rule, such as artificially irrigated areas that would

[19] U.S. Army Corps of Engineers, personal communication, June 5, 2015.

[20] Also under the final rule, if a water in any of these subcategories meets the rule's definition of "adjacent," it is jurisdictional without requiring a significant nexus determination.

[21] Annie Snider, "In Major Shift, new Rule Excludes Some Wetlands, Ponds," *E&E News*, May 28, 2015.

revert to dry land should application of irrigation water to the area cease; artificial reflecting pools or swimming pools created in dry land; and puddles (see **Table 1** for the full list);

- Groundwater (traditionally not regulated under the CWA and expressly excluded under the rule);
- Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land (new provision in the final rule responding to concerns that the rule would adversely affect the ability of municipalities to operate and maintain stormwater systems, including rain gardens and green infrastructure);
- Constructed detention and retention basins created in dry land used for wastewater recycling, as well as groundwater recharge basins and percolation ponds built for wastewater recycling (new in the final rule, in response to public comments); and
- Three types of ditches: ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary; ditches with intermittent flow that are not a relocated tributary, or excavated in a tributary, or that do not drain wetlands, regardless of whether or not the wetland is a jurisdictional water; and ditches that do not flow, either directly or through another water, to a traditional navigable water, interstate water, impoundment, or the territorial seas, regardless of whether the flow is ephemeral, intermittent, or perennial. The treatment of ditches was one of the largest controversies of the proposed rule (see "Concerns of Agriculture and Local Governments"). Under existing rules and long-standing practice, many but not all ditches have been jurisdictional. The proposed rule for the first time attempted to define which ditches are and are not protected under the CWA, but the proposal was confusing and widely criticized. Under the final rule, a ditch may be a "water of the United States" only if it meets the definition of "tributary" and is not otherwise excluded under this provision.

The final rule makes no change to and does not affect existing statutory and regulatory exclusions: exemptions for normal farming, ranching, and silviculture activities such as plowing, seeding, and cultivation (CWA §404(f)); exemptions for permitting of agricultural stormwater discharges and return flows from irrigated agriculture; or exemptions for water transfers that do not introduce pollutants into a waterbody. Nor would it directly change permitting processes.

Definitions of key terms are included in the third section of the rule. Because definitions often are critical to interpreting statutory law and regulations, some stakeholder groups criticized the proposed rule, suggesting that the definitions would enable broader assertion of CWA jurisdiction than is consistent with law and science. Many argued that several of the defined terms in the proposal were confusing, and further that the proposed rule failed to define terms such as "upland," "gullies," and "rills," which they believed needed to be clarified.

The agencies responded in several ways (See **Table 1**):

- In some cases, a particular term that was controversial with public commenters is not used in the final rule, therefore no definition is needed (e.g., "upland").
- In some cases, the term is clarified in the preamble to the rule (e.g., "ephemeral, intermittent, and perennial," "bed and banks," "dry land," and "puddle").
- In some cases, the rule was modified to clarify the term (e.g., "significant nexus").

- In some cases, the agencies declined to add a definition if they concluded that doing so might lead to more confusion (e.g., "ditch").
- Two terms defined in other Corps regulations are carried forward into the final rule, without change, at the request of commenters ("ordinary high water mark" and "high tide line").
- Finally, the agencies declined to define some terms that might have a narrow or geographic-specific application that would not be appropriate for a national rule.

Definitions of two terms in the proposed rule ("riparian area" and "floodplain") are omitted from the final rule, although they are defined in the preamble to the new rule. Both terms had been criticized by commenters for vagueness or ambiguity. Many requested that a specific floodplain interval or other clear limitation be established. In the final rule, the agencies reference the "100-year floodplain," in part because the Federal Emergency Management Agency (FEMA) and Natural Resources Conservation Service (NRCS) have mapped large portions of these areas in the United States, producing maps that are publicly available, well known, and well understood. Also, the agencies concluded that the use of "riparian area" was unnecessarily complicated and that, as a general matter, waters in a riparian area will also be in the 100-year floodplain.[22]

Impacts of the Proposed Rule

Overall, EPA and the Corps say that their intent in the Clean Water rule was to clarify their jurisdiction, in light of the Supreme Court's ruling, not to expand it. Nevertheless, the agencies acknowledge that the rule would increase the *categorical* assertion of CWA jurisdiction, when compared to a baseline of current practices under the 2003 and 2008 EPA-Corps guidance. This results in part from the agencies' expressly declaring some types of waters categorically jurisdictional and not requiring case-specific evaluation of them (such as all waters adjacent to a jurisdictional water).

In changing the regulatory definition of "waters of the United States," there may be instances in which the CWA applies categorically for the first time, and there also may be instances in which the CWA no longer applies (i.e., as a result of exemptions and exclusions). The agencies intend that the rule will result in less ambiguity about whether the CWA applies than under existing regulations, legal rulings, and guidance.

The agencies believe that the rule does not protect any new types of waters that have not been protected historically (that is, beyond the existing regulations, which the new rule will replace) and that it does not exceed the CWA's coverage. That is, while it would enlarge *categorical* jurisdiction beyond that under the 2003 and 2008 EPA-Corps guidance, which the agencies believe was narrower than is justified by science and the law, they believe that it would not enlarge jurisdiction beyond what is consistent with the Supreme Court's current reading of jurisdiction.

The agencies' categorical assertion of waters that are jurisdictional, compared to current practice, does not identify specific waters that will be found to be jurisdictional—i.e., a particular stream or pond—but the rule attempts to draw more of a bright line of CWA jurisdiction than in the past. Moreover, the agencies made a number of changes in the final rule to provide more certainty and clarity, including "bright lines" of jurisdictional demarcation in several parts of the rule.

[22] Final Rule, p. 37082. The rule does not address changes that might result from future revisions to or updating of FEMA and NRCS maps.

In an Economic Analysis document accompanying the final rule, the agencies estimate that the new rule will result in 2.84%-4.65% more positive assertions of jurisdiction over U.S. waters, compared with current field practice.[23] However, compared with the agencies' existing regulations, the final rule reflects a reduction in waters protected by the CWA, according to EPA and the Corps.

According to the analysis, costs to regulated entities and governments (federal, state, and local) are likely to increase as a result of the rule, but the rule itself does not impose direct costs. Indirect costs would result from additional permit application expenses (for CWA Section 404 permitting; stormwater permitting for construction and development activities; and permitting of pesticide discharges and confined animal feeding operations [CAFOs] for discharges to waters that would now be determined jurisdictional) and additional requirements for oil storage and production facilities needing to develop and implement spill prevention, control and countermeasure (SPCC) plans. Federal and state governments would likely experience about $1 million annually in additional costs to administer and process permits. Other costs would likely include compensatory mitigation requirements for permit impacts (if applicable), affecting land developers and state and local governments. The economic analysis considered two scenarios for analyzing impacts of the rule. The agencies estimate that indirect costs associated with the final rule range from $158 million to $307 million per year under a "low end" estimate and $237 million to $465 million per year under a "high end" estimate.[24]

The Section 404 program would see the greatest potential impact as a result of revised assertion of CWA jurisdiction. Most of the projected costs are likely to affect landowners and development companies, state and local governments investing in infrastructure, and industries involved in resource extraction.

The agencies believe that indirect benefits accruing from the proposed rule include the value of ecosystem services provided by the waters and wetlands protected as a result of CWA requirements, such as habitat for aquatic and other species, support for recreational fishing and hunting, and flood protection. Other benefits would include government savings on enforcement expenses, because the rule is intended to provide greater regulatory certainty, thus reducing the need for government enforcement. Business and government may also achieve savings from reduced uncertainty concerning where CWA jurisdiction applies, they believe. In all, the agencies estimate that benefits of the final rule range from $339 million to $350 million per year under a "low end" estimate and $555 million to $572 million under a "high end" estimate. However, they note that there is uncertainty and there are limitations associated with the results, due to data and information gaps, as well as analytic challenges. The analysis does not quantify all possible costs and benefits, and values are meant to be illustrative, not definitive.[25] Overall, they conclude that benefits would exceed costs.

Concerns of Agriculture and Local Governments

The agriculture sector has been vigorous in criticizing and challenging EPA regulatory actions that may affect the sector's operations, making potential impacts of the proposed rule on agriculture a likely focus of controversy. Even before release of the proposed rule, one of the

[23] U.S. Environmental Protection Agency and U.S. Department of the Army, *Economic Analysis of the EPA-Army Corps Clean Water Rule*, May 2015, http://www2.epa.gov/cleanwaterrule/final-clean-water-rule-economic-analysis, p. 53. Hereinafter, Economic Analysis.

[24] See the Economic Analysis for explanation and details.

[25] Ibid., p. v.

sector's concerns about a new "waters of the United States" rule has been whether it would modify existing statutory provisions that exempt "normal farming and ranching" practices from dredge and fill permitting or others that exclude certain agricultural discharges, such as irrigation return flow and stormwater runoff, from all CWA permitting. As described above, the final rule makes no change and does not affect these exemptions, which are self-implementing. An EPA fact sheet discusses the continued exclusions and exemptions.[26] Another of agriculture's concerns was the proposed rule's exclusion of some ditches; many said that the proposal was confusing and could be interpreted as extending CWA jurisdiction to agricultural drainage ditches.

Simultaneous with announcing the Clean Water Rule in March 2014, EPA and the Corps issued an interpretive rule that identified 56 conservation practices approved by the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) that qualify for exemption under the CWA Section 404(f)(1)(A) exclusion of "normal farming and ranching" activities from Section 404 permit requirements and do not require determination whether the discharge involves a "water of the United States." Essentially, the interpretive rule was intended to provide guidance to determine activities that qualify for 404(f)(1)(A) exemptions. The 56 practices, which are a subset of all NRCS conservation practices, are practices such as stream crossings and wetland restoration that take place in aquatic, riparian, or wetland environments. Through this interpretive rule, the agencies intended to resolve uncertainties about "normal farming" activities that are exempt from permitting when these conservation practices are used. In other words, effective immediately, producers who utilize any of the 56 identified practices according to NRCS technical standards would not need to seek a determination of CWA jurisdiction nor seek a CWA permit. The three agencies also signed a Memorandum of Understanding detailing implementation of the interpretive rule and identifying a process for reviewing and updating the list of qualifying NRCS conservation practices. Although the interpretive rule became effective immediately, EPA and the Corps accepted public comment until July 7, 2014.[27]

The interpretive rule was intended to clarify agricultural practices that are exempt from CWA Section 404 permitting. Nevertheless, there was confusion about many issues, including NRCS's role in providing technical assistance to farmers with respect to 404 permitting, and the apparent requirement that these practices had to meet NRCS technical standards to qualify for the exemption. Public comments submitted on the interpretive rule were uniformly critical—including comments submitted by agriculture stakeholder groups, environmental groups, and some state environmental agencies. Agriculture groups argued that it was procedurally flawed, because it would have substantive impact on farmers, and thus should have been subject to notice-and-comment rulemaking procedures under the Administrative Procedure Act. Many also argued that the interpretive rule narrowed the CWA 404(f)(1)(A) statutory exemptions, because the practices listed in the rule already were excluded from Section 404. Under the interpretive rule, farmers would have to comply with NRCS standards in order to qualify for exemption, resulting in a disincentive to conservation, they said. On the other hand, environmental groups and some state environmental agencies were critical of the interpretive rule for different reasons.

[26] See http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_ag_exclusions_exemptions.pdf. Comments submitted to the docket for the interpretive rule (Docket ID No. EPA-HQ-OW-2013-0820) are available at http://www.regulations.gov.

[27] Department of Defense, Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices," 79 *Federal Register* 22276, April 21, 2014.The list of practices, the Memorandum of Understanding, and the interpretive rule are available at http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm. USDA had no formal role in developing the Corps-EPA proposed rule, but it was among the federal agencies commenting on it during interagency review.

They contended that it would exempt activities from permitting that are not truly associated with ongoing farming and that the rule was thus too broad. Some of the listed practices, such as stream crossings, can have significant harmful impacts on water quality and result in violations of state water quality standards, they said.

EPA and Corps officials acknowledged that the 2014 interpretive rule did not appear to have had the intended benefits of clarifying agricultural exemptions and exempting, not contracting, the number of exempted activities, and they said that the agencies and U.S. Department of Agriculture (USDA) were weighing alternatives to the rule. However, before the agencies proposed or took action on the interpretive rule, in the FY2015 omnibus appropriations act, passed in December 2014 (H.R. 83/P.L. 113-235), Congress included a provision directing EPA and the Corps to withdraw it (see "Conclusion" below). On January 29, 2015, the agencies signed a memorandum withdrawing the interpretive rule, effective immediately.[28] Following Congress's action in December, the EPA Administrator indicated that the agency would work with USDA to provide certainty to the regulated community, in a way that provides value both to the government and the agriculture community. No further actions have been announced.

Local Government Concerns

Some local governments also criticized the proposed "waters of the United States" rule. In particular, the National Association of Counties (NACo) argued that counties and other local governments would be affected by the proposed rule in the arena of ditches. NACo pointed out that local governments own and maintain public infrastructure including roadside ditches, flood control channels, and stormwater management structures. Because the proposed rule would have defined some ditches as "waters of the United States" if they meet certain conditions, NACo contended that the proposal potentially increases the number of county-owned ditches under federal jurisdiction. Permit requirements are not an issue, NACo says, but permitting can be time-consuming and expensive.

EPA and Corps officials believed that exclusion of most ditches in the proposed rule actually would decrease federal jurisdiction over ditches. But the issue remained controversial and was addressed with modifications in the final rule. The agencies believe that the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches, as well as ditches on agricultural lands.[29]

Conclusion

The EPA Administrator stated at a congressional hearing in 2014 that it generally takes about one year to finalize a rule. Complex and controversial rules often take much longer from proposal to promulgation. This rule to define "waters of the United States" was finalized 14 months after the proposed rule was announced.

Legal challenges are likely to delay implementation of any rule for years. New regulations may clarify many current questions, but they are unlikely to please all of the competing interests, as one environmental advocate observed.

[28] Environmental Protection Agency and Department of Defense, "Notice of Withdrawal," 80 *Federal Register* 6705, February 6, 2015.

[29] Final Rule, p. 37097.

> However, a rulemaking would only benefit wetlands if it did not reduce the jurisdiction offered by current regulations and if the Administration remained faithful to sound science. If politics were to trump sci ence in the rulemaking process, the likelihood of such a protective rule would not be promising. Also, rules are subject to legal challenge and can be tied up in court for years before they are implemented.[30]

Another consideration is possible action by Congress, even though a final rule has been promulgated. Congressional interest in the rule has been strong since the proposed rule was announced in March 2014. Hearings were held during the 113th Congress and have continued in the 114th Congress; bills to bar the agencies from finalizing the proposed rule or otherwise alter the agencies' course regarding the rule have been introduced. (For information, seeCRS Report R43943, *EPA and the Army Corps' "Waters of the United States" Rule: Congressional Response and Options*, by Claudia Copeland.)

Many critics in Congress and elsewhere urged that the proposed Clean Water Rule be withdrawn, or that the agencies propose a supplemental rule, subject to another round of public comments. EPA and Corps officials pointed out that doing so would leave in place the status quo—with determinations of CWA jurisdiction being made by 38 Corps districts pursuant to existing regulations, coupled with non-binding agency guidance, and many of these determinations involving time-consuming case-specific evaluation.

Some industry and agriculture groups that had criticized the status quo in the past said more recently that they preferred it to the 2014 proposed rule, which they believed was ambiguous and overly broad. EPA and Corps officials believe that the final rule responds to those criticisms. The agencies' intention has been to clarify the rules and make jurisdictional determinations more predictable, less ambiguous, and more timely. Based on press reports of stakeholders' early reactions to the final rule, some believe that the agencies largely succeeded in that objective, while others believe that they did not.[31]

Recent Developments

Legal challenges to the Clean Water Rule were filed in multiple federal courts soon after it was announced. These lawsuits, filed by industry groups, more than half of the states, and several environmental groups (nearly 90 plaintiffs so far), will test whether the agencies' interpretation of CWA jurisdiction is consistent with the Supreme Court's rulings and whether the rule complies with substantive and procedural requirements of the CWA and other laws.

Because of uncertainty about the correct judicial venue for challenging the rule,[32] petitions for review have been filed both in federal district courts and courts of appeal.As of December 1,

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[30] James Murphy, "*Rapanos v. United States*: Wading Through Murky Waters," *National Wetlands Newsletter*, vol. 28, no. 5, September-October 2006, p. 19.

[31] See, for example, Amena H. Saiyid, "Obama Says Water Jurisdiction Rule Provides Clarity, Certainty; Critics Claim Overreach," *Daily Environment Report*, May 28, 2015, p. A-1. Also see releases from organizations such as the American Farm Bureau Federation, "Final 'Waters of the U.S.' Rule: No, No, No! No Clarity, No Certainty, No Limits on Agency Power," June 11, 2015 (http://www.fb.org/index.php?action=newsroom.news_article&id=311); and the National Association of Counties, "NACo Voices Concern on Final 'Waters of the U.S.' Rule," June 8, 2015 (http://www.naco.org/legislation/WW/Lists/Posts/Post.aspx?ID=1037).

[32] The judicial review section of the CWA, Section 509, vests exclusive, original review jurisdiction over enumerated EPA actions under the act in the federal courts of appeals. The initial issue with Section 509 is that none of the listed EPA actions clearly cover the Clean Water Rule. Indeed, in the preamble to the final rule, EPA and the Corps acknowledge that "[t]he Supreme Court and lower courts have reached different conclusions on the types of actions that fall within section 509," and offers no opinion of its own as to review of the Clean Water Rule. If a court finds that the rule is not covered by Section 509, review jurisdiction presumably will lie in the district courts pursuant to the (continued...)

petitions for review of the rule have been filed in eight appellate courts; most have been consolidated in the Sixth Circuit. Sixteen separate challenges also were filed in 12 federal district courts. On October 9, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit placed a nationwide stay on the 2015 rule, pending further developments, including the need to determine the court's own jurisdictional authority.[33] On the substance of the complaints, the court said there was a good chance that the plaintiffs would prevail on the merits. A two-judge majority said that the significance of the new rule warranted leaving the prior regulatory regime in place, while the third judge said that until the question of subject-matter jurisdiction is answered, the new rule should not be stayed.[34] The Sixth Circuit court will hear arguments on December 8 on whether it has exclusive jurisdiction to review the rule. As a result of the court's order, the Corps and EPA will continue to make CWA jurisdictional determinations based on the 2008 guidance, as they did before promulgation of the 2015 rule.

(...continued)

federal question statute. That statute, applicable where no more specific statute provides otherwise, gives the district courts original jurisdiction over "all civil actions arising under the ... laws ... of the United States." (28 U.S.C. §1331) See CRS Legal Sidebar WSLG1369, *The EPA/Corps Clean Water Rule: What Court or Courts Get to Rule on the Legal Challenges?*

[33] On August 27, a district court in North Dakota issued a preliminary injunction that blocked implementation of the rule in 13 states, but not in the remaining 37 states.

[34] In re Environmental Protection Agency and Department of Defense, Nos. 15-3799 et al. (6th Cir., Oct. 9, 2015), http://www.ca6.uscourts.gov/opions.pdf/15a0246p-06.pdf.

Table 1. Comparison of "Definition of Waters of the United States" Regulatory Language

Existing Regulatory Language, 2014 Proposed Rule, and Revised Language in Final Rule Announced May 27, 2015

Existing Regulatory Language[a]	Proposed Regulatory Language	Revised Regulatory Language	Comments[b]
(a) The term *waters of the United States* means	(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in subsection (b) of this section, the term "waters of the United States" means:	(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in subsection (b) of this section, the term "waters of the United States" means:	
(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;	(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;	(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;	These waters are often referred to as "traditional navigable waters" (TNWs), which include but are not limited to the "navigable waters of the United States" within the meaning of Section 10 of the Rivers and Harbors Act of 1899. No change from the existing rule or 2014 proposal.
(2) All interstate waters including interstate wetlands;	(2) All interstate waters, including interstate wetlands;	(2) All interstate waters, including interstate wetlands;	These waters include tributaries to interstate waters, waters adjacent to interstate waters, waters adjacent to tributaries of interstate waters, and others that have a significant nexus to interstate waters. No change from the existing rule or 2014 proposal. Interstate waters would continue to be "waters of the United States" even if they are not navigable in fact and do not connect to such waters.
(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) Which are or could be used by	(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.	(7) All waters in paragraphs (i) through (v) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in paragraphs (i) through (v) of this paragraph are similarly situated and shall be combined, for purposes of a	In the existing rule, there is a non-exclusive list of the types of "other waters" which may be found to be "waters of the U.S." The existing description is omitted under the final rule as unnecessary and confusing because it has been incorrectly read as an exclusive list.

Existing Regulatory Language[a]	Proposed Regulatory Language	Revised Regulatory Language	Comments[b]
interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are or could be used for industrial purpose by industries in interstate commerce;		significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required. (i) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest. (ii) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain. (iii) *Pocosins*. Pocosins are evergreen shrub- and tree-dominated wetlands found predominantly along the Central Atlantic coastal plain. (iv) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers. (v) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along	Under the final rule, the five subcategories of waters listed in this paragraph are not jurisdictional as a single category or class, but the agencies have determined that they are similarly situated because they perform similar functions and are located sufficiently close to each other to function together in affecting downstream waters. Therefore, EPA and the Corps believe that it is reasonable that these waters be evaluated in combination (i.e., prairie potholes with prairie potholes) for purposes of a case-specific significant nexus. They may be evaluated either individually or as a group of waters in a region, meaning the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry.

Existing Regulatory Language[a]	Proposed Regulatory Language	Revised Regulatory Language	Comments[b]
		the Texas Gulf Coast.	
		(8) All waters located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water, and no case-specific significant nexus is required.	For these waters, the agencies have not made a determination that the waters are "similarly situated" (unlike the waters described in paragraph (a)(7)). As a result, a significant nexus analysis for these waters will include a case-specific assessment of whether there are any similarly situated waters, as well as whether the water, alone or in combination with any waters determined to be similarly situated, has a significant nexus to a traditional navigable water, interstate water, or territorial seas. In a change from the proposed rule, the final rule sets a distance threshold for case-specific evaluation of these waters for significant nexus. In addition to distance, aquatic functions will play a prominent role in determining whether specific waters covered by this paragraph have a significant nexus.
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;	(4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section;	(4) All impoundments of waters otherwise identified as waters of the United States under this section;	Impoundments of a traditional navigable water, interstate water, the territorial seas, or a tributary are jurisdictional by rule. As a matter of policy and law, impoundments do not de-federalize a water, even where there is no longer flow below the impoundment. That is, damming or impounding a water of the United States does not make the water

Existing Regulatory Language[a]	Proposed Regulatory Language	Revised Regulatory Language	Comments[b]
			non-jurisdictional.
(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;	(5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this section;	(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;	Tributaries, as defined in the final rule, of a traditional navigable water, interstate water, the territorial seas, or an impoundment would be jurisdictional by rule and do not require a case-specific significant nexus analysis. Unless excluded under subsection (b) of the rule, any water that meets the rule's definition of tributary is a water of the United States. Waters that meet the rule's definition of tributary remain tributaries even if there is a manmade or natural break at some point along the connection to the traditional navigable water, interstate water, or the territorial sea, so long as bed and banks and an ordinary high water mark are present upstream of the break. "Tributary" is defined below. It includes natural, undisturbed waters and those that have been man-altered or constructed, but which science shows function as a tributary.
(6) The territorial seas;	(3) The territorial seas;	(3) The territorial seas;	This term establishes the seaward limit of "waters of the United States." Jurisdictional by rule; no change from the existing rule. The term generally refers to the part of the ocean immediately adjacent to shoreline and extending seaward up to 12 miles.

Existing Regulatory Language[a]	Proposed Regulatory Language	Revised Regulatory Language	Comments[b]
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.	(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section; and	(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;	All waters adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment, or tributary would be jurisdictional by rule. Under the rule, an adjacent water includes wetlands within or abutting its ordinary high water mark. Waters separated by a berm or other similar feature remain "adjacent."
	(b) The following are not "waters of the United States"	**(b) The following are not "waters of the United States"**	
(8) Waters of the United States do not include prior converted cropland.[c] Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.	(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.	(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.	No change proposed.
Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. 423.11(m) which also meet the criteria of this definition) are not waters of the United States.[d]	(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.	(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.	The agencies do not believe that omitting the parenthetical reference to 40 C.F.R. 423.11(m) is a change in substance to the waste treatment exclusion or how it is applied.
	(3) Ditches that are excavated wholly in uplands, drain only uplands or non-jurisdictional waters, and have less than perennial flow. (4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.	(3) The following ditches: (i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary. (ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands. (iii) Ditches that do not flow, either directly or through another water, into a	Under the final rule, a ditch may be a "water of the United States" only if it meets the definition of "tributary" and is not excluded under this subparagraph. The final rule codifies and clarifies long-standing practice and guidance (including 1986 and 1988 preamble language), which has been to exclude these waters from jurisdiction.

Existing Regulatory Language[a]	Proposed Regulatory Language	Revised Regulatory Language	Comments[b]
		water identified in paragraphs (a)(1) through (3) of this section.	A ditch that relocates a stream is not an excluded ditch, and a stream is relocated either when at least a portion of its original channel has been physically moved, or when the majority of its flow has been redirected. If a ditch has been cut to carry intermittent or perennial flow from a wetland, the ditch is serving as a conduit for transferring flow from a wetland to a downstream water. Thus, the ditch has changed the wetland's hydrologic regime, and the segment of the ditch that physically intersects the wetland would be considered jurisdictional. The final rule confirms long-standing policy that ditches may function as point sources that discharge pollutants, thus subject to CWA Section 402.
	(5) The following features: (i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease; (ii) artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; (iii) artificial reflecting pools or swimming pools created by excavating and/or diking dry land; (iv) small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; (v) water-filled depressions created incidental to construction activity;	(4) The following features: (i) Artificially irrigated areas that would revert to dry land should application of water to that area cease; (ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds; (iii) Artificial reflecting pools or swimming pools created in dry land; (iv) Small ornamental waters created in dry land; (v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits	The final rule codifies long-standing practice and guidance (including 1986 and 1988 preamble language), which has been to exclude these waters from jurisdiction. These waters would not be jurisdictional by rule. The final rule is revised to omit terms that were confusing in the proposal (e.g., "upland") and clarify others (e.g., "water-filled depressions"). The list of excluded features is illustrative, not exhaustive.

Existing Regulatory Language[a]	Proposed Regulatory Language	Revised Regulatory Language	Comments[b]
	(vi) groundwater, including groundwater drained through subsurface drainage systems; and (vii) gullies and rills and non-wetland swales.	excavated for obtaining fill, sand, or gravel that fill with water; (vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and (vii) Puddles.	
		(5) Groundwater, including groundwater drained through subsurface drainage systems.	The exclusion does not apply to surface expressions of groundwater, such as where groundwater emerges on the surface and becomes baseflow in streams or spring fed ponds.
		(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.	The exclusion is intended to address engineered stormwater control structures in municipal or urban environments. It is intended to exclude the diverse range of stormwater control features that are currently in place, such as rain gardens, low impact development and flood control systems, and may be developed in the future.
		(7) Wastewater recycling structures constructed in dry land; detention and retention basins build for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.	This exclusion codifies long-standing agency practice and encourages water management practices that the agencies agree are important and beneficial.
	(c) Definitions—	**(c) Definitions—**In this section, the following definitions apply:	
(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency	(6) **Wetlands**: The term *wetlands* means those areas that are inundated or saturated by surface or ground water at	(4) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a	No change. Wetlands are ecosystems that often occur at the edge of aquatic (water,

Existing Regulatory Language[a]	Proposed Regulatory Language	Revised Regulatory Language	Comments[b]
and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.	a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.	frequency and duration sufficient to support, and that, under normal circumstances, do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.	fresh or salty) or terrestrial (upland) systems. Wetlands typically represent transitional zones between aquatic and upland systems.
(c) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."	(1) **Adjacent**: The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."	(1) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such waters. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.	The rule includes wetlands and other waters that meet the definition of adjacent, including "neighboring," which is defined separately. Only waters, not land, are adjacent. Within the definition of "adjacent," the terms bordering and contiguous are well understood, and the agencies will continue to interpret and implement those terms consistent with current policy and practice.
(d) The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less	No change proposed	(7) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less	

Existing Regulatory Language[a]	Proposed Regulatory Language	Revised Regulatory Language	Comments[b]
continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.		continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.	
(e) The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding area.	No change proposed	(6) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding area.	"Ordinary high water mark" sets the boundary of adjacent non-wetland waters (e.g., open waters such as lakes and ponds). Physical indicators of ordinary high water mark can be created by perennial, intermittent, and ephemeral flows.
	(2) **Neighboring**: The term *neighboring*, for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (a)(5) of this section, or waters with a surface or shallow subsurface hydrologic connection to such a jurisdictional water.	(2) *Neighboring*. The term *neighboring* means: (i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark; (ii) All waters located within the 100-year floodplain of a water identified in	"Neighboring" is the key determinant of whether a water is "adjacent," and thus jurisdictional by rule. Where the 100-year floodplain is greater than 1,500 feet, all wetlands within 1,500 feet of the tributary's ordinary high water mark are jurisdictional because they are "neighboring" to the tributary, regardless of the wetland's position relative to each other. Waters within the 100-year floodplain

Existing Regulatory Language[a]	Proposed Regulatory Language	Revised Regulatory Language	Comments[b]
		paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain; (iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.	that are located more than 1,500 feet and up to 4,000 feet from the ordinary high water mark, or high tide line, are subject to case-specific significant nexus analysis under paragraph (a)(8).
	(3) **Riparian area**: The term *riparian area* means an area bordering a water where surface or subsurface hydrology influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.		Omitted in the final rule because the agencies determined that the use of the riparian area was unnecessarily complicated and that as a general matter, waters within the riparian area will be within the 100-year floodplain.
	(4) **Floodplain:** The term floodplain means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.		Omitted in the final rule, which uses reference to 100-year floodplain in order to more clearly identify the outer limit of "neighborning."
	(5) **Tributary**: The term *tributary* means a waterbody physically characterized by the presence of a bed and banks and	(3) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either	This term has not previously been defined in any regulation or preamble. Bed and banks and ordinary high water

Existing Regulatory Language[a]	Proposed Regulatory Language	Revised Regulatory Language	Comments[b]
	ordinary high water mark, as defined at 33 C.F.R. §328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams) or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made waterbody and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section.	directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.	mark (OHWM) are features that generally are physical indicators of flow. OHWM generally defines the lateral limits of a water. In many tributaries, the bed is that part of the channel below the OHWM, and the banks often extend above the OHWM. Man-altered and man-made tributaries perform many of the same functions as natural tributaries and provide connectivity between streams and downstream rivers.

Existing Regulatory Language[a]	Proposed Regulatory Language	Revised Regulatory Language	Comments[b]
	(7) **Significant nexus**: The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to a water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or close to a "water of the U.S." so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.	(8) *Significant nexus*. The *term significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph.[e] A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following: (i) Sediment trapping, (ii) Nutrient recycling, (iii) Pollutant trapping, transformation,	In the final rule, the agencies list specific functions relevant to significant nexus evaluation to add clarity and transparency. A water does not need to perform all functions. If a water performs a single function that has significant impact on a downstream water, that is a significant nexus. Under the final rule, only waters covered by subparagraph (a)(7) or (a)(8) require case-specific analysis.

Existing Regulatory Language[a]	Proposed Regulatory Language	Revised Regulatory Language	Comments[b]
		filtering, and transport, (iv) Retention and attenuation of flood waters, (v) Runoff storage, (vi) Contribution of flow, (vii) Export of organic matter, (viii) Export of food resources, and (ix) Provision of life cycle-dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.	

Source: Prepared by CRS.

Notes: The proposed rule that was announced on March 25, 2014, was published in the *Federal Register* on April 21, 2014 (79 *Federal Register* 22188-22274). The final revised rule was announced jointly by EPA and the Army Corps on May 27, 2015, and was published in the *Federal Register* on June 29: Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Clean Water Rule: Definition of 'Waters of the United States,' Final Rule," 80 *Federal Register* 37054-37127, June 29, 2015.

a. 33 C.F.R. 328.3, 40 C.F.R. 122.2, 40 C.F.R. 230.3, and 40 C.F.R. 232.2 (definition of "waters of the United States"). The term "navigable waters" is defined at 40 C.F.R. 110.1 (Discharge of Oil); 40 C.F.R. 112.2 (Oil Pollution Prevention); 40 C.F.R. 116.3 (Designation of Hazardous Substance); 40 C.F.R. 117.1(i) (Determination of Reportable Quantities for Hazardous Substances); 40 C.F.R. 300.5 and Appendix E 1.5 to Part 300 (National Oil and Hazardous Substances Pollution Contingency Plan); and 40 C.F.R. 302.3 (Designation, Reportable Quantities, and Notification).

b. Comments in this table are drawn from the preamble and text of the final rule.

c. The term "prior converted cropland" is included in the U.S. Department of Agriculture's administrative definition of the term "wetland" (see 7 C.F.R. 12.2).

d. A definition of "waste treatment system" is found in EPA regulations (35 C.F.R. 35.905): "Complete waste treatment system. A complete waste treatment system consists of all of the treatment works necessary to meet the requirements of title III of the Act, involved in (a) The transport of waste waters from individual homes or buildings to a plant or facility where treatment of the waste water is accomplished; (b) the treatment of the waste waters to remove pollutants; and (c) the ultimate disposal, including recycling or reuse, of the treated waste waters and residues which result from the treatment process. One complete waste treatment system would, normally, include one treatment plant or facility, but also includes two or more connected or integrated treatment plants or facilities."

e. Probably should be "(i) through (ix) of this paragraph."

Appendix. EPA's Connectivity Report and Review by the Science Advisory Board

In September 2013, EPA released a draft report that reviews and synthesizes the peer-reviewed scientific literature on the connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans. As described below, after review and revision, this report was finalized in January 2015. The purpose of the review, according to EPA, was to summarize current understanding about these connections, the factors that influence them, and mechanisms by which connected waters affect the function or condition of downstream waters. The focus of the draft report, which was prepared by EPA's Office of Research and Development, was on small or temporary non-tidal streams, wetlands, and open waters. Based on the reviewed literature, it made certain findings.

- All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers.
- Wetlands and open waters in riparian areas and floodplains also are physically, chemically, and biologically connected with rivers and serve an important role in the integrity of downstream waters. In these types of wetlands, water-borne materials can be transported from the wetland to the river network and vice versa (e.g., water from a stream flows into and affects the wetland).
- Wetlands and open waters where water only flows from the wetland or water to a river network, (i.e., non-floodplain waters and wetlands that lack surface water inlets) such as many prairie potholes, vernal pools, and playa lakes, provide numerous functions that can benefit downstream water quality and integrity. However, because such wetlands occur on a gradient of connectivity, it is difficult to generalize, from the literature alone, about their effects on downstream waters or to generalize about the degree of connectivity (absolute or relative).

EPA asked its Science Advisory Board (SAB) to review the draft report and to comment on whether its conclusions and findings are supported by the available science.[35] The EPA draft report is not intended as a policy document—it does not reference either the Scalia plurality or Kennedy tests in *Rapanos*, nor does it address legal standards for CWA jurisdiction. Nevertheless, the report is important to EPA and the Corps because, when finalized, it will provide a scientific basis needed to clarify CWA jurisdiction and, thus, to inform the "waters of the United States" rulemaking.[36] The SAB convened a special panel of scientists to review the draft synthesis document. This ad hoc panel held meetings and teleconferences from late 2013 through mid-2014 and prepared a report with recommendations.

In its report,[37] the SAB ad hoc panel found strong support for the first two of EPA's major conclusions in the synthesis document and concluded that it is a thorough and technically

[35] The SAB was established pursuant to the Environmental Research, Development, and Demonstration Authorization Act (42 U.S.C. 4365) to provide independent scientific and technical advice to the EPA Administrator on the technical basis for agency positions and regulations.

[36] See U.S. Environmental Protection Agency, "Clean Water Act Definition of 'Waters of the United States,'" http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm.

[37] Science Advisory Board, "SAB Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, Draft Report," August 11, 2014, 105 pp., (continued...)

accurate review of the literature on the connectivity of streams and wetlands to downstream waters. In particular, the panel agreed with EPA's conclusions that ephemeral, intermittent, and perennial streams exert a strong influence on the character and functioning of downstream waters and that tributary streams are connected to downstream waters. Further, the panel agreed with EPA that streams and wetlands in floodplain settings are physically, chemically, and/or biologically connected to downstream navigable waters.

The ad hoc panel found that the peer-reviewed literature supports EPA's conclusions in the synthesis report that connectivity occurs along a gradient or continuum between fully connected and completely isolated, with a transition in between that varies case-by-case. However, the panel concluded that the EPA report often refers to connectivity as though it is a binary property (connected versus not connected). Instead, the panel found that there are four dimensions to connectivity (longitudinal, lateral, vertical, and temporal). It is technically more accurate to state that the consequences to downstream waters are determined by variation in the frequency, duration, predictability, and magnitude of connections and that relatively low levels of connectivity can be meaningful in terms of impacts.

The ad hoc panel disagreed with EPA's third major conclusion, that it is difficult to generalize from currently available literature the degree of connectivity or the downstream effects of non-floodplain waters and wetlands that are not connected to a river network through surface or shallow subsurface water. The SAB panel found that "the scientific literature supports a more definitive statement that reflects how numerous functions of non-floodplain wetlands sustain the physical, chemical, and/or biological integrity of downstream waters, although the degree of connectivity can vary widely."[38] The report would be strengthened, the ad hoc panel said, if it framed the discussion of connectivity gradients and their consequences as a function of the magnitude, duration, and frequency of connectivity pathways among wetlands and downstream waters and if it quantified each connection, to the degree possible, while identifying research and data gaps. The panel found that at sufficiently large spatial and temporal scales, all waters and wetlands are connected. More important are the degree of connection (e.g., frequency, duration) and the extent to which those connections affect the chemical, physical, and biological integrity of downstream waters. Within non-floodplain wetlands, the degree of connectivity and implications for integrity of downstream waters vary considerably.

> The EPA Report suggests that determining the connectedness of each non-floodplain wetland must be done on a case-by-case basis. The SAB suggests that the vast majority of non-floodplain wetlands can be classified with respect to some degree of hydrologic, chemical or biological connections to downstream waters; however, some hydrologically and spatially disconnected wetlands may need to be considered on a case-by-case basis. The challenge for the EPA is to describe the hierarchy of decisions and the tools necessary to assess the degree of connection necessary to warrant case-by-case analysis.[39]

The full, chartered SAB reviewed the ad hoc panel's report in September 2014. SAB members said that the panel's review of the draft EPA study was technically accurate and clear and that it accurately established linkages between streams, wetlands, and downstream waters. The SAB members asked for several minor revisions to the ad hoc panel's report, which were reflected in

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(...continued)

http://yosemite.epa.gov/sab/SABPRODUCT.NSF/81e39f4c09954fcb85256ead006be86e/212BB1480331835285257D350041A1C0/$File/SAB+Connectivity+Panel+Draft+Report_8_11_14_%28quality+review+draft%29.pdf.

[38] Ibid., pp. 1, 6.

[39] Ibid., p. 56.

an October 17, 2014, letter to the EPA Administrator with its findings and recommendations regarding the synthesis document.[40]

Based on the SAB review, EPA's scientists revised the draft scientific assessment report and released a final report in January 2015.[41] As revised, the report endorses the SAB recommendation in full by interpreting the literature on connectivity of streams to downstream waters as reflecting a gradient approach that recognizes variation in the frequency, duration, magnitude, predictability, and consequences of those connections. In the final report, EPA says that connectivity of streams and wetlands to downstream waters occurs along a continuum, and that variation in the degree of connectivity influences the range of functions provided by streams and wetlands. The final report no longer concludes that there is insufficient science to find that there are connections between non-floodplain wetlands and downstream waters, suggesting that case-specific analysis may not be needed for all such waters to determine that CWA jurisdiction applies.

SAB Review of the Proposed "Waters of the U.S." Rule

In addition to advising the EPAAdministrator on the "connectivity" report, the chartered SAB agreed to review the adequacy of the scientific and technical basis of the proposed "waters of the United States" rule. As input to the SAB, members of the ad hoc panel that reviewed the "connectivity" report subsequently reviewed the proposed rule. (Unlike their formal review of the "connectivity" report, the panel did not seek consensus on their views of the scientific basis of the proposed CWA rule.) The ad hoc panel sought to bring their scientific expertise to questions of law and policy in the proposed rule, but at the same time, members' comments highlighted some difficulties in doing so.

Members of the ad hoc panel found general agreement that, based on available science, tributaries and adjacent waters and wetlands are appropriately jurisdictional under the proposed rule. They generally agreed that from a scientist's perspective, key terms in the proposed rule need clarification and better definition, including "significant," "similarly situated," "floodplain," and "adjacent." The definition of "adjacent" is important, for example, because where "adjacent" is determined then determines the beginning of "other waters" that require case-by-case evaluation of jurisdiction. Several said that the proposed definition of "tributary" should be broader, that is, that it should specify a bed and bank (as proposed) and *in some cases* an ordinary high water mark (but not in all cases, as proposed in the rule). Several referred to the panel's review of the "connectivity" report and said that the rule should equally reflect the importance of chemical and biological connections between waters, as well as hydrological connections, in determining significant nexus, as the panel's report did. Similarly, several noted the emphasis in the panel's report on connections resulting from groundwater pathways—shallow subsurface, shallow or deep groundwater—in questioning the categorical exclusion of federal jurisdiction over groundwater in the proposed rule.[42] Likewise, some on the panel said that the distinction between

[40] The October 17, 2014, letter and SAB final peer review of the draft "connectivity" report is available at http://yosemite.epa.gov/sab/sabproduct.nsf/WebReportsLastFiveBOARD/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf.

[41] Environmental Protection Agency, Office of Research and Development, *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence*, EPA/600/R-14-475F, January 2015, http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414.

[42] In addition to uncertainty over the scope of CWA jurisdiction in general, courts are split on the question of whether EPA and the Corps may assert jurisdiction over groundwater connected to navigable waters. The statutory language is ambiguous when discussing groundwater. See Anna Makowski, "Beneath the Surface of the Clean Water Act: (continued...)

ditches that would and would not be jurisdictional under the proposed rule is unclear and may not be adequately supported by the science, although they recognized that the agencies may have policy reasons for including some ditches as jurisdictional and excluding others.

The full chartered SAB also considered the ad hoc panel's review of the proposed "waters of the United States" rule in September, and it approved an advisory letter to be sent to the EPA Administrator.[43] The letter also supports case-by-case consideration of most "other waters" as "waters of the United States," but it finds that there is adequate scientific evident to support a determination that certain types of waters in particular U.S. regions (e.g., prairie potholes, Texas coastal prairie wetlands) could be categorically considered waters of the United States, thus not requiring case-specific analysis. In the letter, the SAB urged EPA to reconsider the definition of tributaries, which the proposed rule defines as having a bed, a bank, and an ordinary high water mark, because in the SAB's judgment, not all tributaries have ordinary high water marks. Finally, the letter disagrees with certain categorical exclusions in the proposed rule, saying that science does not justify excluding waters such as groundwater, ditches with only intermittent or ephemeral flow, gullies, rills, and non-wetland swales, because in many cases they can be connected to jurisdictional waters or can be conduits for moving water between jurisdictional waters.

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Exploring the Depth of the Act's Jurisdictional Scope of Groundwater Pollution," *Oregon Law Review*, vol. 91 (2012), pp. 495-526.

[43] The text of the SAB letter concerning the proposed rule is available at http://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007+unsigned.pdf.

Evolution of the Meaning of "Waters of the United States" in the Clean Water Act

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CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The scope of waters that are properly the subject of federal water pollution legislation has been the subject of long-standing consideration by all three branches of the federal government, particularly in the aftermath of the 1972 amendments to the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act. In a shift from early water pollution legislation, those amendments eliminated the requirement that the federally regulated waters—known as jurisdictional waters—must be navigable in the traditional sense, meaning that they are capable of being used by vessels in interstate commerce. Rather than use classical tests of navigability, the amendments redefined "navigable waters" for purposes of the Clean Water Act's jurisdiction to include "the waters of the United States, including the territorial seas." Disputes over the proper meaning of that phrase have been ongoing.

Some courts and commentators also disagree on how the scope of federal jurisdictional waters changed over time as a result of interpretative approaches taken by the federal agencies responsible for administering the Clean Water Act—the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). While some believe EPA and the Corps consistently expanded the meaning of "waters of the United States," others contend that, in recent years, the agencies have construed the term in a narrower fashion than permitted under the Clean Water Act. In 2015, the Corps and EPA issued a new rule, known as the Clean Water Rule, that substantially redefined "waters of the United States" in the agencies' regulations for the first time in more than two decades. Some observers disagree on whether the Clean Water Rule constitutes an expansion of jurisdiction over waters not previously regulated. This report provides context for this debate by examining the history of major changes to the meaning of "waters of the United States" as expressed in federal regulations, legislation, agency guidance, and case law.

The Clean Water Act uses the phrase "waters of the United States," but it does not include a statutory definition of that term. The long-standing disagreement over the meaning of that phrase has centered on the degree to which the Clean Water Act should be interpreted as covering the widest amount of "waters" that could permissibly be federally regulated under the Constitution, or whether that term should be interpreted in a more limited fashion.

Federal authority to regulate waters within the United States primarily derives from the Commerce Clause, and accordingly, federal laws and regulations concerning waters of the United States cannot cover matters which exceed that constitutional source of authority. During the first two decades after the passage of the Clean Water Act, courts generally interpreted the act as having a wide jurisdictional reach. In recent decades, however, the Supreme Court has emphasized that "the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." This modern Commerce Clause jurisprudence has informed federal courts' approach to interpreting which "waters" are subject to the Clean Water Act.

Most recently, courts have taken up legal challenges to the Clean Water Rule. On October 9, 2015, the United States Court of Appeals for the Sixth Circuit stayed its enforcement, and the House version of the FY2017 Interior-Environment appropriations bill (H.R. 5538) would block its application by prohibiting the use of appropriated funds to implement changes to the meaning of jurisdictional waters beyond those that were in effect on October 1, 2012.

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Introduction

The scope of waters that are properly the subject of federal water pollution legislation has been the subject of long-standing consideration by all three branches of the federal government, particularly in the aftermath of the 1972 amendments to the Federal WaterPollution Control Act, commonly referred to as the Clean Water Act. In a shift from prior water pollution legislation, those amendments eliminated the requirement that the federally regulated waters—known as jurisdictional waters—must be navigable in the traditional sense,[1] meaning that they are capable of being used by vessels in interstate commerce.[2] Rather than use classical tests of navigability developed in the 19th century,[3] the Clean Water Act redefined "navigable waters" for purposes of federal regulatory jurisdiction to include "the waters of the United States, including the territorial seas."[4] Disputes over the proper meaning of that phrase have been ongoing.

Some courts and commentators also disagree on how the scope of federal jurisdictional waters changed over time as a result of interpretative approaches taken by the agencies responsible for administering the Clean Water Act—the Environmental Protection Agency (EPA) and the U.S Army Corps of Engineers (Corps). While some believe EPA and the Corps consistently expanded the meaning of "waters of the United States," others contend that, in recent years, the agencies have construed the term in a narrower fashion than permitted under the Clean Water Act.[5] This

[1] In *Riverside Bayview Homes v. United States*, 474 U.S. 121, 132-33 (1985), the Supreme Court explained that, in the 1972 Clean Water Act amendments, "Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes, and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." The Commerce Clause gives Congress the power to "regulate commerce with foreign nations, and among the several states...." U.S. CONST. art. 1, §8, cl. 3.

[2] *See The Daniel Ball*, 77 U.S. 557, 563 (1870) (construing the term "navigable waters," as employed in federal statutes at issue, as covering those waters that are "used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water"); The Montello, 87 U.S. 430, 441-42 (1874) ("If [the subject water] be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway."); United States v. Holt State Bank, 270 U.S. 49 (1926) ("The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water[.]").

[3] At common law, only waters subject to the ebb and flow of tide were held to be navigable waters subject to federal jurisdiction. *See The Daniel Ball*, 77 U.S. at 563; Nelson v. Leland, 63 U.S. 48, 55 (1860). This rule was largely due to the fact that, given the geography of England, there were few waters which were susceptible to use in commerce that were not also subject to the ebb and flow and tide. *See The Daniel Ball*, 77 U.S. at 563. Based on geographic differences and the recognition that "[s]ome of our [American] rivers are as navigable for many hundreds of miles above as they are below the limits of tide water," American courts in the 19th century departed from the common law rule and began to analyze whether waters were "navigable-in-fact." *Id.*; *see also*, *e.g.*, *Nelson*, 63 U.S. at 55-56 (distinguishing between admiralty jurisdiction exercised in England and in the United States); Escanaba Cnty. v. Chicago, 107 U.S. 678, 682-83 (1883) (describing how the common law rule "has long since been discarded in this country").

[4] *See* 33 U.S.C. §1362(7).

[5] *Compare*, *e.g.*, Rapanos v. United States, 547 U.S. 715, 722 (2006) (plurality opinion) (Scalia, J.) (describing "the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations") *and* Jamison E. Colburn, *Waters of the United States, Theory, Practice, and Integrity at the Supreme Court*, 34 FLA. ST. U. L. REV. 183, 199 (2007) (explaining "how two relatively conservative administrative agencies gradually decided, in six different Presidential administrations, to expand federal jurisdiction as dramatically as they have") *with* Jon Devine et al., *The Historical Scope of Clean Water Act Jurisdiction*, ENVTL. FORUM, July/August 2012, at 57, (attempting to "refute[] the contention (continued...)

debate resurfaced most recently in May 2015 when the Corps and EPA issued a rule, known as the Clean Water Rule, which substantially redefined "waters of the United States" in the agencies' regulations for the first time in more than two decades.[6] EPA and the Corps contend that the Clean Water Rule governs only waters that have been historically regulated under the Clean Water Act, but its opponents argue that it constitutes an unlawful expansion of authority beyond that which is allowed in the act or the Constitution.[7] This report provides context for this debate by examining the history of major changes to the meaning of "waters of the United States" as expressed in federal regulations, legislation, agency guidance, and case law.[8]

Background

The Clean Water Act is the principal law governing pollution of the nation's surface waters.[9] Among other requirements, the act prohibits the unauthorized discharge of pollutants into "navigable waters,"[10] and requires persons wishing to discharge dredged or fill material into "navigable waters" to obtain a permit from the Corps.[11] In its definition section, the act defines

(...continued)

that the Corps and EPA have steadily expanded their assertions of the [Clean Water] [A]ct's scope" and arguing "that the agencies have actually retreated from the jurisdictional scope initially intended and asserted for the CWA") *and* Envtl. Prot. Agency & Dep't of the Army, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States, 18-34 (May 27, 2015), https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf [hereinafter Technical Support for the Clean Water Rule] (discussing the history of regulatory definitions of "waters of the United States" and asserting that the Clean Water Rule represents a contraction in jurisdiction).

[6] *See infra* "The Clean Water Rule."

[7] *See infra* "Response to the Clean Water Rule."

[8] While this report outlines many notable changes to the definition of "waters of the United States," it does not address every agency interpretation or application of that phrase. For example, the report does not address most property-specific applications of the definition of "waters of the United States," such as those made in National Pollutant Discharge Elimination System Permit (NPDES) decisions, *e.g.*, Envtl. Prot. Agency, Off. of Gen. Counsel, Opinion No. 21, In re Riverside Irrigation District, LTD and 17 Others (June 27, 1975), 1975 WL 23864, at *1-5 (interpreting the Clean Water Act and EPA's definition of "waters of the United States" in its regulations to determine whether an NPDES permit may be required for irrigation return flow canals and irrigation and drainage ditches); Section 404 dredge and fill permit decisions, ORM Jurisdictional Determinations and Permit Decisions, U.S. ARMY CORPS OF ENG'RS, http://corpsmapu.usace.army.mil/cm_apex/f?p=340:2:0::NO (last visited July 28, 2016) (database of Section 404 permit decisions), or jurisdictional determinations, ORM Jurisdictional Determinations and Permit Decisions, U.S. ARMY CORPS OF ENG'RS, http://corpsmapu.usace.army.mil/cm_apex/f?p=340:11:0::NO (last visited July 28, 2016) (database of jurisdictional determinations); U.S. Army Corps of Eng'rs v. Hawkes Co., Inc., 578 U.S. ___, 136 S. Ct. 1807 (2016) (providing background on the process of providing jurisdictional determinations as to whether a specific parcel is subject to Section 404's dredge and fill permit requirements). This report also does not address minor changes among EPA's various regulatory definitions which do not reflect a change in the agency's overall interpretation of the scope of waters of the United States. *See, e.g.*, Envtl. Prot. Agency, Off. of Gen. Counsel, Opinion No. 77-3, Clarification of the Term "Navigable Waters" as it is Presently Used in FWPCA Regulations and Guidelines (February 28, 1977), 1977 WL 28236 (discussing differences among EPA's definitions and proposals to streamline the definition).

[9] *See* Michael Goldman, Symposium, *Drilling into Hydraulic Fracturing and Shale Gas Development: A Texas and Federal Environmental Perspective*, 19 TEX. WESLEYAN L. REV. 185, 191 (2012); Walter G. Wright, Jr. & Albert J. Thomas III, *The Federal/Arkansas Water Pollution Control Programs: Past Present and Future*, 23 U. ARK. LITTLE ROCK L. REV. 541, 550 (2001); CRS Report RL30030, *Clean Water Act: A Summary of the Law*, by Claudia Copeland, at 1.

[10] 33 U.S.C. §1311(a).

[11] *Id.* §1344.

the term "navigable waters" to mean "waters of the United States, including its territorial seas."[12] This single, jurisdiction-defining phrase applies to the entire law, including the national pollutant discharge elimination system (NPDES) permit program;[13] permit requirements for disposal of dredged or fill material, known as the Section 404 program;[14] water quality standards and measures to attain them;[15] oil spill liability and prevention;[16] and enforcement.[17]

The Clean Water Act itselfdoes not expand further on the meaning of "waters of the United States." Instead, the Corps and EPA have expounded on this phrase through agency guidance and regulations, which, at various times, have been stricken down or modified as a result of legal challenges. These legal challenges—particularly those which were successful—can be seen to have followed broader trends in interpretation of the Commerce Clause,[24] which gives Congress the power to "regulate commerce with foreign nations, and among the several states...."[25]

Key Terminology

Navigable-in-fact waters: A term of art developed by courts to describe waters that are navigable in the traditional sense, meaning they are capable of being used by vessels in interstate commerce.[18]

Navigable waters of the United States: A statutory phrase often used in pre-Clean Water Act legislation, which courts generally interpreted to mean navigable-in-fact waters.[19]

Interstate waters: Waters which form a part of state's boundary.[20]

Navigable waters: An anomalous term as used in the Clean Water Act. The Clean Water Act governs "navigable waters,"[21] but this phrase is defined within the statute such that it is not limited to waters that are navigable-in-fact.

Waters of the United States: The jurisdiction-defining phrase in the Clean Water Act. That statute generally regulates "navigable waters," but it defines that term to mean "the Waters of the United States, including the territorial seas."[22]

Jurisdictional waters: A term of art used by courts to describe those waters subject to federal regulatory jurisdiction under the Clean Water Act.[23]

Federal court review of the Corps' and EPA's interpretation of which "waters" are subject to the Clean Water Act has been informed by both statutory and constitutional considerations, including whether an agency's interpretation could potentially enable it to regulate matters beyond the constitutional reach of the federal government as interpreted in recent Supreme Court case law.Federal authority to regulate waters within the United States primarily derives from the Commerce Clause.[26] Accordingly, federal

[12] *Id.* §1362(7).

[13] *Id.* §1342.

[14] *Id.* §1344.

[15] *Id.* §1313.

[16] *Id.* §1321.

[17] *Id.* §1319.

[18] *See, e.g.*, PPL Mont., LLC v. Montana, 565 U.S. __, 132 S. Ct. 1215, 1219 (2012) (quoting *The Daniel Ball*, 77 U.S. 557, 563 (1871)).

[19] *See, e.g.*, *The Daniel Ball*, 77 U.S. at 563.

[20] *See* Federal Water Pollution Control Act of 1948, P.L. 845, 62 Stat. 1155, 1161.

[21] 33 U.S.C. §1362(7).

[22] *Id.*

[23] *See, e.g.*, U.S. Army Corps of Eng'rs v. Hawkes Co., Inc., 578 U.S. ___, 136 S. Ct. 1807, 1814 (2016).

[24] *See infra* "Judicially Imposed Limitations Beginning in the Late 1990s."

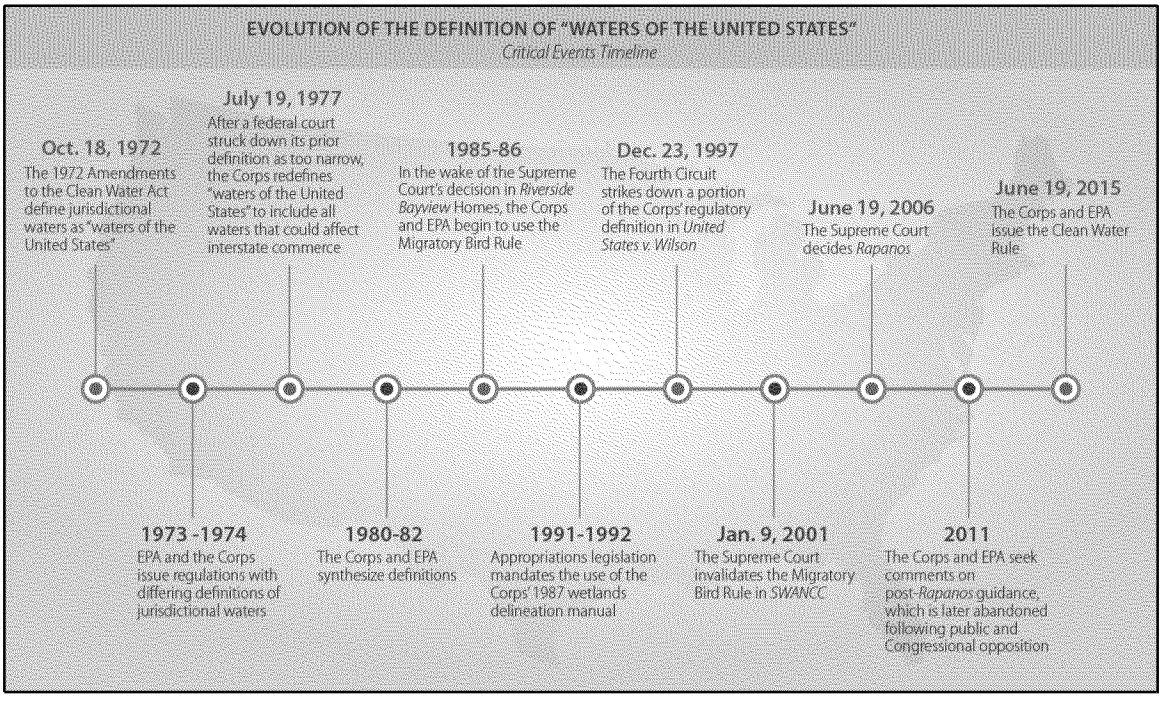
[25] U.S. CONST. art. 1, §8, cl. 3.

[26] *See* Gilman v. Philadelphia., 70 U.S. 713, 724-725 (1866) ("The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are (continued...)

laws and regulations concerning waters of the United States cannot cover matters which exceed that constitutional source of authority.[27] For a period after its enactment in 1972, courts generally interpreted the Clean Water Act as having a wide jurisdictional reach, but, in recent decades, the Supreme Court has emphasized that "the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited."[28]

A time line of events in the evolution of the definition of "waters of the United States" is provided in the **Appendix**, and major events are shown in **Figure 1**.

Figure 1. Major Events in the Evolution of "Waters of the United States"



Source: Congressional Research Service, based on the sources cited in this report.

(...continued)

accessible from a State other than those in which they lie."); Gibbons v. Ogden, 22 U.S. 1 (1824) (concluding that Congress had authority under the Commerce Clause to license steamboat operations in New York waters); see also Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (discussing Congress's invocation of the Commerce Clause powers in enacting the Clean Water Act).

[27] *See, e.g.*, Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173-74 (2001) (declining to interpret jurisdictional reach of the Clean Water Act in a manner which may exceed the limits of the Commerce Clause).

[28] *See id.* at 172 (citing United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995)).

The Early History of Jurisdictional Waters

Historically, federal laws regulating waterways, such as the Rivers and Harbors Appropriations Act of 1899 (Rivers and Harbors Act), exercised jurisdiction over "navigable water[s] of the United States[.]"[29] The Supreme Court interpreted this phrase to govern only waters that were "navigable-in-fact"—meaning that they were "used, or are susceptible of being used, ... as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[30]

Beginning with the Federal Water Pollution Control Act of 1948, Congress began to use a different jurisdiction-defining phrase in which it regulated "interstate waters," defined as "all rivers, lakes, and other waters that flow across, or form a part of, a State's boundaries."[31] That legislation was amended in 1961 to expand federal jurisdiction from "interstate waters" to "interstate or navigable waters[.]"[32]

The Federal Water Pollution Control Act Amendments of 1972,[33] which have commonly become known as the Clean Water Act,[34] also amended the jurisdictional reach of federal water pollution legislation. There, Congress again exercised jurisdiction over "navigable waters," but provided a new definition of that phrase that was not used in prior legislation, stating the following: "The term 'navigable waters' means the waters of the United States, including the territorial seas."[35] This subtle definitional change proved to have tremendous consequences for the jurisdictional scope of the Clean Water Act.

In debating the 1972 amendments that created the Clean Water Act, some Members of Congress explained that the revised definition was intended to expand the law's jurisdiction beyond traditionally navigable or interstate waters. The conference report states that the "conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation...."[36] And during debate in the House on approving the conference report, one Representative explained that the definition "clearly encompasses all water bodies, including

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[29] *See* Rivers and Harbors Appropriations Act of 1899, 30 Stat. 1121, 1151 (codified in 33 U.S.C. §401) ("It shall not be lawful to construct or commence the construction of any bridge, causeway, dam, or dike over or in any ... navigable water of the United States until the consent of Congress shall have been obtained...."); An Act to Provide Security for the Lives of Passengers on Board of Vessels Propelled by Steam, 5 Stat. 304 (1838) (providing that "it shall not be lawful for the owner ... of any steamboat ... to transport any goods, wares, merchandise or passengers, in or upon ... navigable waters of the United States ... without having first obtained ... a license").

[30] *See The Daniel Ball*, 77 U.S. 557, 563 (1870). Waters, the Court explained in *The Daniel Ball*, "constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a contained [sic] highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *Id.*

[31] *See* Federal Water Pollution Control Act of 1948, P.L. 845, §10(e), 62 Stat. 1155, 1161.

[32] *See* Federal Water Pollution Control Act Amendments of 1961, P.L. 87-88, §8(a), 75 Stat. 204, 208 (codified in 33 U.S.C. §1160(a) (1970)).

[33] P.L. 92-500, 86 Stat. 816.

[34] *See* History of the Clean Water Act, ENVTL. PROT. AGENCY (May 25, 2016), https://www.epa.gov/laws-regulations/history-clean-water-act.

[35] *See* Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, §502(7), 86 Stat. 816, 886 (codified in §1362(7)).

[36] S.Rept. 92-1236, at 144 (1972) (Conf. Rep.).

streams and their tributaries, for water quality purposes."[37] Courts have frequently referred to this legislative history when interpreting the scope of the Clean Water Act.[38]

Differing Agency Definitions Following the Clean Water Act

The Corps and EPA share responsibilities for administering the Clean Water Act. Both agencies have administrative responsibilities under Section 404 of the act,[39] and EPA exclusively administers most other Clean Water Act-related programs.[40] As a consequence of this dual jurisdiction, both agencies create regulations defining the waters subject to their regulatory jurisdiction.[41] In the initial years following the enactment of the Clean Water Act, their respective definitions differed significantly.[42]

EPA's Initial Definition

EPA issued its first internal definition of jurisdictional waters in a February 6, 1973 memorandum from its Office of the General Counsel.[43]

[37] *See* 118 Cong. Rec. 33,757 (1972) (statement of Rep. Dingell).

[38] *See, e.g.*, Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 180-81 (2001) (Stevens, J., dissenting) (discussing the conference report and changes to the House version of the 1972 amendments); Riverside Bayview Homes v. United States, 474 U.S. 121, 132-33 (1985) (citing, among other things, the conference report and statements of Rep. Dingell); United States v. Holland, 373 F. Supp. 665, 667-73 (M.D. Fla. 1974) (discussing legislative history of the 1972 amendments).

[39] *See* Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1991-92 (January 15, 2003) (providing background on the agencies' roles in administering the Clean Water Act); Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 ECOLOGY L.Q. 811, 814 n.6 (2003) (discussing the division of administrative responsibility under the Clean Water Act); CRS Report RL30030, *supra* note 9, at 6 (discussing the joint administration of Section 404).

[40] *See* 33 U.S.C. §1251(d) (stating that EPA will implement the Clean Water Act unless expressly stated otherwise); Benjamin R. Civiletti, *Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act*, 43 Op. Att'y Gen. 197, 197 (1979) ("Congress intended to confer upon the administrator of the [EPA] the final administrative authority to determine ... the reach of the term 'navigable waters'....").

[41] *See* 33 C.F.R. §328.3 (2016) (containing the Corps' definition of "waters of the United States"); 40 C.F.R. §122.2 (2016) (including one EPA definition of "waters of the United States").

[42] *See* Bradford Mank, *Implementing Rapanos—Will Justice Kennedy's Significant Nexus Text Provide a Workable Standard for Lower Courts, Regulators and Developers?*, 40 IND. L. REV. 291, 300 (2007) ("From 1972 until 1975, the EPA and the Corps disagreed about the scope of the [Clean Water] Act's jurisdiction.").

[43] *See* Envtl. Prot. Agency, Off. of Gen. Counsel, Meaning of the Term "Navigable Waters" (February 13, 1973), 1973 WL 21937. Prior to the General Counsel's memorandum, EPA published a notice of proposed rule in which it repeated, without expanding upon, the statutory definition of "navigable waters." *See* Notice of Proposed Rulemaking, National Pollutant Discharge Elimination System, 38 Fed. Reg. 1362, 1363 (January 11, 1973). Both the Corps and EPA initially addressed the definition of "navigable waters" in their Clean Water Act regulations rather than elaborate on the meaning of "waters of the United States."

EPA's First Internal Definition of Jurisdictional Waters

In a February 6, 1973, memorandum from its Office of the General Counsel, EPA proposed to define jurisdictional waters through six categories:

(1) all navigable waters of the United States;

(2) tributaries of navigable waters of the United States;

(3) interstate waters;

(4) interstate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;

(5) interstate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and

(6) interstate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

EPA, however, never incorporated this definitionin its regulations. Instead, it published its first set of regulations implementing the Clean Water Act's NPDES program later in 1973, in which it largely adopted the general counsel's recommended definition, but with one critical change: EPA revised categories four through six to include *intrastate* lakes, rivers, and streams which are utilized for interstate activities.[45]

The Corps' Initial Definition

The Corps' early implementation of the 1972 amendments differed considerably from EPA's regulations.[46] After initially proposing regulations that simply repeated the statutory definition of "navigable waters,"[47] the Corps issued final regulations in April 1974.[48] There, the Corps acknowledged the language from the conference report for the Clean Water Act as calling for the "broadest possible constitutional interpretation" of navigable waters, but concluded that the Constitution limited its jurisdiction to the same waters which it regulated under preexisting laws, such as the Rivers and Harbors Act.[49] Based on this reasoning, the Corps defined "navigable

[44] *See* Envtl. Prot. Agency, Off. of Gen. Counsel, Meaning of the Term "Navigable Waters" (February 13, 1973), 1973 WL 21937.

[45] *See* National Pollutant Discharge Elimination System, 38 Fed. Reg. 13528, 13,529 (1973) (codified at 40 C.F.R. §125.1(p) (1974)). EPA issued a similar, but slightly modified definition of "navigable waters" in its regulations implementing the 1972 amendments' oil pollution prevention provisions. *See* Oil Pollution Prevention, 38 Fed. Reg. 34,164, 34,165 (December 11, 1973) (codified in 33 C.F.R. §112.2(k) (1974)). This definition did not include intrastate waters used for industrial purposes interstate commerce (Category 6), and it expanded upon on the first category as follows: "all navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 amendments...." *see id.* Other EPA regulations at the time repeated the statutory definition of "navigable waters" without expanding upon it. *See* Envtl. Prot. Agency, Off. of Gen. Counsel, Opinion No. 77-3, Clarification of the Term "Navigable Waters" as it is Presently Used in FWPCA Regulations and Guidelines (February 28, 1977), 1977 WL 28236 (discussing differences among EPA's definitions).

[46] *See* Mank, *supra* note 42, at 300.

[47] *See* Proposed Policy, Practice, and Procedure: Permits for Activities in Navigable Waters or Ocean Waters, 38 Fed. Reg. 12,217, 12,218 (May 10, 1973).

[48] Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115, 12,119 (April 3, 1974) (codified in 33 C.F.R. §209.120(d)(1) (1974)).

[49] *See id.* at 12115.

waters" using language that generally limited its jurisdiction to waters that were navigable-in-fact.[50]

The Corps' First Definition of Jurisdictional Waters

In its first set of final regulations implementing Section 404, the Corps equated the "navigable waters" regulated under the Clean Water Act with traditionally navigable waterways regulated under preexisting federal laws like the Rivers and Harbors Act:

> The term "navigable waters of the United States" and "navigable waters," as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce....[51]

Callaway and its Aftermath

Less than one year after the Corps published its first regulations defining jurisdictional waters, the United States District Court for the District of Columbia struck them down as too narrow and inconsistent with the Clean Water Act.[52] In *Natural Resources Defense Council v. Callaway*, the court held that because "Congress ... asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution[,]" the definition could not be limited to "traditional tests of navigability[.]"[53] The court ordered the Corps to produce new regulations which acknowledged "the full regulatory mandate" of the Clean Water Act.[54]

The Corps' Expansion of Jurisdictional Waters Following *Callaway*

The Corps responded to *Callaway* on May 6, 1975, by publishing proposed regulations which offered four alternative methods of redefining the Corps' jurisdiction under the 1972 amendments.[55]

[50] *See* 33 C.F.R. §209.12(d)(1) (1974); *see also* 33 C.F.R. §209.260(e)(1) (1974) ("[I]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor.").

[51] 33 C.F.R §209.12(d)(1) (1974).

[52] *See* Nat. Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).

[53] *See* Callaway, 392 F. Supp. 685 Courts prior to *Callaway* also concluded that regulatory jurisdiction under the 1972 Amendments extended to waters that were not navigable-in-fact. *See, e.g.*, United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1129-30 (6th Cir. 1974) (holding that Congress intended to control discharge of pollutants into nonnavigable tributaries which flowed into navigable waters, and that this exercise of authority was constitutional); United States v. Holland, 373 F. Supp. 665, 673 (M.D. Fla. 1974) (holding that Congress intended to address "the pollution of non-navigable mosquito canals and mangrove wetland areas").

[54] *See* Callaway, 392 F. Supp. at 685. Although the court ordered the Corps to publish final regulations within 30 days, it later extended its original deadlines. *See* Proposed Policy, Practice and Procedure: Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 19,766 (May 6, 1975).

[55] *See* Proposed Policy, Practice and Procedure: Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. at 19,766.

The Corps' Four Proposed Alternatives Following *Callaway*

Following *Callaway*, the Corps published four proposed alternative scenarios in which it would evaluate Section 404 permits:

Alternative 1: Extend the Corps' jurisdiction to "virtually every coastal and inland artificial or natural waterbody[,]" and apply the Corps' permitting process to "all disposal of dredged or fill material in virtually every wetland contiguous to coastal waters, rivers, estuaries, lakes, streams and artificial waters...."

Alternative 2: Limit jurisdiction to waters subject to the ebb and flow of tide and navigable-in-fact inland waters and their primary tributaries.

Alternative 3: Apply the jurisdictional authority in Alternative 1, but utilize only the Corps' standard permitting process for navigable-in-fact waters. For waters that are not navigable-in-fact,[56] the Corps would approve permits unless the state objects.

Alternative 4: Apply the limited jurisdiction in Alternative 2 and the limited permitting process of Alternative 3. The Corps stated that Alternative 4 was its preferred approach.[57]

At the same time that it proposed these alternatives, the Corps published a press release stating that the holding of *Callaway* may require "the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion" to obtain federal permits.[58] These events brought significant public and media attention to the breadth of jurisdiction under the Clean Water Act.[59] It also created a disagreement between the Corps and EPA,[60] and led to a series of subcommittee hearings in the House and Senate.[61]

In the aftermath of this attention, the Corps issued interim final regulations in 1975 in which it revised the definition of "navigable waters" by adopting much of the structure used in EPA's 1973 regulations.[62] The Corps' definition also added "wetlands, mudflats, swamps, marshes, and

[56] In its early regulations implementing the Clean Water Act, the Corps did not use the phrase "navigable-in-fact," and instead used the phrase "navigable waters of the United States," which was derived from prior laws such as the Rivers and Harbors Act. *See id.* at 17,968. Because of the similarity of language, and to provide clarity, this report uses the phrase "navigable-in-fact" to refer to traditionally navigable waters.

[57] *See id.* at 19,766.

[58] *See* Press Release, Dep't of the Army, Office of the Chief of Eng'rs (May 6, 1975), reprinted in *Section 404 of the Federal Water Pollution Control Act Amendments of 1976, Hearings Before the Senate Comm. on Public Works*, 94th Cong., 517 (1976).

[59] *See, e.g.*, *Army Engineers Seek Control of All Waters, Down to Ponds*, NEW YORK TIMES, May 7, 1975, at 12, PROQUEST; *Wetlands and the Corps of Engineers*, WASHINGTON POST, June 3, 1975, at A18, PROQUEST. The Corps received over 4,500 comments on its proposed regulations, including comments from a "large number of Governors; members of Congress; Federal, State, and local agencies;" interest groups and members of the public. *See* Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320 (July 25, 1975).

[60] EPA responded to the press released by accusing the Corps of misleading the public. Letter from Russell E. Train, EPA Admin., to Lt. Gen. William C. Gribble, Jr., Chief of Eng'rs, U.S. Army Corps. of Eng'rs (May 16, 1975), reprinted in *Section 404 of the Federal Water Pollution Control Act Amendments of 1972, Hearings Before the Senate Comm. on Public Works*, 94th Cong., 528-29 (1976) (stating that the public confusion and misunderstanding "is directly attributable to the seriously inaccurate and misleading press release issued by the Corps").

[61] *See Development of New Regulations by the Corps of Engineers, Implementing Section 404 of The Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the H. Comm. On Public Works and Transportation*, 94th Cong. (1995); *see also* Joanne M. Frasca, *Federal Control of Wetlands: The Effectiveness of Corps' Regulations under 404 of the FWPCA*, 51 NOTRE DAME LAW. 505, 506 & n.11 (1976) (citing and discussing hearings held on July 15, 16, and 22, 1975).

[62] *Compare* Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,324 (July 25, 1975) [hereinafter 1975 Interim Final Rule] (codified in 33 C.F.R. §209.129(d)(2) (1976)) (Corps' revised definition) *with* 40 (continued...)

shallows" that are "contiguous or adjacent to other navigable waters" and "artificially created channels and canals used for recreational or other navigational purposes that are connected to other navigable waters" to the definition of "waters of the United States."[63]

The Corps' 1977 Regulations

In 1977, the Corps issued final regulations reorganizing the definition of "waters of the United States" into five categories.[64]

The Corps' 1977 Definition and Its Commerce Clause-Focused Provision

The Corps reorganized the definition of "waters of the United States" in 1977, with Category 5 waters containing its broadest definition of jurisdictional waters as of that date:

> (1) The territorial seas with respect to the discharge of fill material ... ;
>
> (2) Coastal and inland waters, lakes, rivers, and streams that are [navigable -in-fact], including adjacent wetlands;
>
> (3) Tributaries to navigable waters of the United States ... ;
>
> (4) Interstate waters and their tributaries, including adjacent wetlands; and
>
> (5) All other waters of the United States not identified in Categories 1 -3, such as isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters ... the destruction of which could affect interstate commerce.[65]

The final category of the 1977 definition contained the Corps' most expansive definition of jurisdictional waters as of that time. A footnote to the Corps' regulations explained that the Category Five waters incorporate "all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce."[66] The Corps would continue to use this Commerce Clause-focused provision (with revisions) in its regulations through 2014,[67] and EPA would later adopt it in its regulations.[68]

(...continued)

C.F.R. §125.1(p) (1974) (EPA's definition of "navigable waters" for purposes of the Clean Water Act oil pollution prevention program).

[63] *See* 1975 Interim Final Rule, 40 Fed. Reg. at 31,324. The 1975 Interim Final Rule used a phased approach in which the Corps expanded its authority in three phases to be completed by 1977. See *id.* at 31,325-26. Phase I, which was immediately effective, included coastal waters and inland navigable-in-fact waters and their adjacent wetlands. *See id.* at 31, 321-26. Phase II, which took effect on July 1, 1976, extended to lakes and primary tributaries of Phase I waters, as well as wetlands adjacent to the lakes and primary tributaries. *Id.* Phase III, which took effect on July 1, 1977, extended to all remaining areas encompassed by the regulations. *Id.* at 31,325.

[64] *See* Final Rule, Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122 (July 19, 1977) [hereinafter 1977 Corps Rule]. Rather than continue to adjust the meaning of "navigable waters," the Corps expanded upon the meaning of the phrase "waters of the United States" as its method of defining its regulatory jurisdiction in the 1977 Corps Rule. *See id.* at 37,127 ("Many suggested that we change our nomenclature of the term 'navigable waters' and refer to our jurisdiction under Section 404 [of the Clean Water Act] as 'waters of the United States.' ... We have adopted this suggestion and feel that it will assist in distinguishing between the Section 404 program and the types of waters that are subject to the permit programs administered under the [Rivers and Harbors Act].").

[65] *See* 33 C.F.R. §323.2(a) (1978).

[66] *See* 33 C.F.R. §323.2(a)(5) n.2 (1978).

[67] *See* 33 C.F.R. §328.3(a)(3) (2014) (defining "waters of the United States" to include, among other things, "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, (continued...)

The Clean Water Act of 1977

After the Corps' 1975 and 1977 regulations, bills were introduced which sought to limit the Clean Water Act's jurisdiction to traditional, navigable-in-fact waters.[69] This limiting legislation never became law. Instead, Congress amended the Federal Water Pollution Control Act through the Clean Water Act of 1977, which did not alter the jurisdictional phrase "waters of the United States."[70]

The original version of the Clean Water Act of 1977 introduced in the House would have limited the Corps' jurisdiction,[71] and an amendment proposed in the Senate sought similar limitations,[72] but the original Senate version, which generally retained the existing definition of "navigable waters," was adopted in conference and passed into law.[73] The Clean Water Act of 1977, as enacted, contained certain exemptions from Section 404 permitting for "normal farming, silviculture, ... ranching[,]" and other activities.[74]

Synthesizing Definitions Following the Clean Water Act of 1977

While the 1977 legislation appeared to temporarily resolve some congressional dispute over the reach of the Clean Water Act, disagreement arose between the Corps and EPA over which agency had final authority to determine which waters were subject to Section 404 permit requirements.[75] EPA independently defined the jurisdictional reach of the Clean Water Act as it related to the programs like NPDES and oil pollution prevention,[76] but it incorporated the Corps' definition into its regulations related to Section 404 permits.[77] At the same time, however, EPA separately expanded on that definition in an appendix to its Section 404 regulations.[78]

(...continued)

prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce").

[68] *See* 40 C.F.R. §122.3 (1981).

[69] *See e.g.* S. 867, 95th Cong. (1977) (amending the definition of "navigable waters" to exclude water wholly contained on private property, under the jurisdiction of a state and local government, or which is not susceptible to use as a means to transport commerce); H.R. 3199, 95th Cong. (1977) (redefining "navigable waters" as navigable-in-fact waters and adjacent wetlands).

[70] *See* P.L. 95-217, 91 Stat. 1566 (1977).

[71] *See* H.R. 3199, 95th Cong. §16 (1977) (as introduced) (proposing to redefine "navigable waters" as used in Section 404 to "mean all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide").

[72] *See* 123 CONG. REC. 26,710-11 (1977) (proposed amendment by Sen. Bentsen).

[73] *See* 123 CONG. REC. 39,187 (1977) (statement of Sen. Muskie) ("The conference bill follows the Senate bill by maintaining the full scope of Federal regulatory authority over all discharges of dredged or fill material into any of the Nation's waters.").

[74] *See* P.L. 95-217, §67, 91 Stat. at 1600 (codified in 33 U.S.C. §1344(f)).

[75] *See* Michael C. Blumm & Elisabeth Mering, *Vetoing Wetland Permits Under Section 404(c) of the Clean Water Act: A History of Inter-Federal Agency Controversy and Reform*, 33 U.C.L.A. J. ENVTL. & POLICY 215, 233 (2015).

[76] *See supra* note 45 and accompanying text.

[77] *See* Navigable Waters, Discharge of Dredged or Fill Material, 40 Fed. Reg. 41,292, 41,293 (September 5, 1975) (codified at 40 C.F.R. §230.2(b) (1976)).

[78] *See id.* at 41,297 app. A.

The U.S. Attorney General ultimately intervened in 1979 and provided a legal opinion that EPA has final administrative authority to determine the reach of the term "navigable waters" for purposes of Section 404.[79] The Corps and EPA eventually executed a Memorandum of Agreement in 1989 resolving that EPA would act as the lead agency responsible for developing programmatic guidance and interpretation of the scope of jurisdictional waters, and the Corps would be responsible for most case-specific determinations on whether certain property was subject to Section 404.[80]

Although it took the agencies 10 years after the Attorney General's opinion to formally agree on a division of responsibilities,[81] the Corps and EPA streamlined and harmonized the regulatory definition of "waters of the United States" well before that. In May 1980, EPA issued regulations redefining the term among its consolidated permit requirements,[82] and the Corps adopted EPA's definition in its regulations two years later.[83] The two agencies continued to use this definition (with modifications) until the Clean Water Rule was published in 2015.[84]

[79] *See* Benjamin R. Civiletti, *Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act*, 43 Op. Att'y Gen. 197, 197-202 (1979), *available at* https://www.epa.gov/sites/production/files/2015-08/documents/civiletti_memo.pdf.

[80] *See* Dep't of the Army & Envtl. Prot. Agency, Mem. of Agreement: Exemptions Under Section 404(F) of the Clean Water Act (1989), available at http://www.usace.army.mil/Portals/2/docs/civilworks/mous/enfmoa.pdf.

[81] For background on the interagency dispute over the administration of Section 404, see Blumm & Mering, *supra* note 75.

[82] Final Rule, Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,424 (May 19, 1980) (codified in 40 C.F.R. §122.3 (1981)).

[83] *See* Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794, 31,810 (July 22, 1982) (codified in 33 C.F.R. §323.2 (1983)). In its initial proposed regulations implementing the Clean Water Act of 1977, the Corps proposed a shorter, three-category definition which excluded "man-made, non-tidal drainage and irrigation ditches" from "waters of the United States." *See* Proposed Rule, Proposal to Amend Regulations for Controlling Certain Activities in Waters of the United States, 45 Fed. Reg. 62,732, 62,747 (September 19, 1980). That proposal was never adopted.

[84] *Compare* Final Rule, Consolidated Permit Regulations, 45 Fed. Reg. at 33,424 (EPA's definition in the Consolidated Regulations issued in 1980) *and* Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. at 31,810 (the Corps' adoption of EPA's definition) *with* Technical Support for the Clean Water Rule, *supra* note 5, at 18 n.1 (EPA's standard definition immediately prior to the issuance of the Clean Water Rule) *and* 33 C.F.R. §328.3(a)(3) (2014) (the Corps' definition prior to the Clean Water Rule).

The Unified Definition of "Waters of the United States"

By 1982, both the Corps and EPA used the following definition of "waters of the United States" in their regulations:

> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of tide;
>
> (b) All interstate waters, including interstate "wetlands";[85]
>
> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
>
> > (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
> >
> > (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
> >
> > (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
>
> (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
>
> (e) Tributaries of waters identified in paragraphs (1)-(4) of this definition;
>
> (f) The territorial seas; and
>
> (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)-(f) of this definition.[86]

Changes in Jurisdictional Waters in the 1980s

Riverside Bayview Homes

A legal challenge to the Corps' application of "waters of the United States" was reviewed by the Supreme Court for the first time in 1985 in *United States v. Riverside Bayview Homes, Inc.*[87] There, the Corps sought to enjoin a property owner from discharging fill material on his wetlands located 1 mile from the shore of Lake St. Clair in Michigan,[88] a 468-square-mile, navigable-in-fact lake that forms part of the boundary between Michigan and Ontario, Canada.[89] The Corps argued that, by defining "waters of the United States" to include wetlands that are "adjacent to" other jurisdictional waters, including navigable-in-fact waters like Lake St. Clair, its regulations required the landowner to obtain a Section 404 permit before discharging fill material.[90]

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[85] "Wetlands" were defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that do support a prevalence of vegetation.... Wetlands generally include swamps, marshes, bogs, and similar areas." *See* Final Rule, Consolidated Permit Regulations, 45 Fed. Reg. at 33,424.

[86] *See* 40 C.F.R. §122.3 (1981) (EPA's definition); Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. at 31,810 (codified in 33 C.F.R. §323.2 (1983)) (the Corps' definition).

[87] *See* 474 U.S. 121 (1985).

[88] *See id.* at 124-25; *see also* United States v. Riverside Bayview Homes, 729 F.2d 391, 392 (6th Cir. 1984) (describing the wetland property at issue).

[89] *See Lake Saint Clair,* ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/place/Lake-Saint-Clair-lake-North-America.

[90] *See Riverside Bayview Homes, Inc.*, 474 U.S. at 124-25.

Before the case reached the Supreme Court, the Sixth Circuit concluded that it must construe the Corps' regulatory definition narrowly in order to avoid a potential violation of the Fifth Amendment prohibition on the taking of private property for public use without just compensation.[91] Applying this method of interpretation, the Sixth Circuit construed the Corps' regulations so as not to include the wetlands at issue, and it avoided reaching a decision on whether the Corps' regulations were constitutional.[92]

The Supreme Court reversed.[93] Although it acknowledged that on a "purely linguistic level" it may seem unreasonable to classify *lands*, wet or otherwise, as *waters*, the Supreme Court called such a plain language approach "simplistic."[94] Further, it rejected the lower courts' concerns over the constitutionality of the Corps' regulations as "spurious."[95] Instead of applying a narrow approach to avoid constitutional implications, the Court gave deference to the Corps' position, and concluded that because "[w]ater moves in hydrological cycles" rather than along "artificial lines," it was reasonable for the Corps to conclude that "adjacent wetlands are inseparably bound up with the 'waters' of the United States..."[96]

The Court also cited legislative history from the passage of the Clean Water Act and the amendments in 1977—in which the term "adjacent wetlands" was added to the statute[97]—as support for its conclusion that Congress intended for the Clean Water Act to have a broad jurisdictional reach which included the adjacent wetlands at issue.[98] In concluding that adjacent wetlands could reasonably be covered, however, the Court also emphasized that it was "not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, ... and we do not express any opinion on that question."[99]

The Migratory Bird Rule and Other Adjustments to "Waters of the United States"

Following *Riverside Bayview Homes*, the Corps and EPA engaged in rulemaking in which they interpreted the Clean Water Act to govern all waters which were used or may have been used by migratory birds crossing state lines.[100] The agencies did not redefine "waters of the United States"

[91] *See Riverside Bayview Homes*, 729 F.2d at 397-98; *see also* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

[92] *See Riverside Bayview Homes*, 729 F.2d at 397-98.

[93] *Riverside Bayview Homes, Inc.*, 474 U.S. at 139.

[94] *See id.* at 132. This comment appears to be in response to the Sixth Circuit's statement that "[t]he language of the [Clean Water Act] makes no reference to 'lands' or wetlands' or flooded areas at all." *Riverside Bayview Homes*, 729 F.2d at 397.

[95] *See Riverside Bayview Homes, Inc.*, 474 U.S. at 129.

[96] *Id.* at 133-34.

[97] *See* Clean Water Act of 1977, *See* P.L. 95-217, 91 Stat. 1566, 1601 (1977) (codified in 33 U.S.C. §1344(g)(1).

[98] See *Riverside Bayview Homes, Inc.*, 474 U.S. at 132-34. In a later decision, *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers*, the Supreme Court stated that its decision in *Riverside Bayview Homes* "was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters." 531 U.S. 159, 180-81 (2001); *see also infra* "*SWANCC*."

[99] *Id.* at 131 n.8.

[100] *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (November 13, 1986); Final Rule: Clean Water Act Section 404 Program Definitions and Permit Exemptions, 53 Fed. Reg. 20,764, 20,765 (June 6, 1988). Although it did not adopt the Migratory Bird Rule in published rulemaking until 1988, EPA (continued...)

through this interpretation, which came to be known as the Migratory Bird Rule, but instead stated the Migratory Bird Rule was a "clarification" of the existing regulatory definition.[101]

The agencies also continued to adjust their interpretation of the definition of "waters of the United States" in the late 1980s by, among other things, excluding nontidal drainage and irrigation ditches, artificial lakes or ponds used for irrigation and stock watering, reflecting pools, and swimming pools.[102] In 1993, the agencies jointly revised their regulations to exclude "prior converted cropland"—areas that were previously drained and converted to agricultural use—from jurisdictional waters.[103]

Competing Wetland Manuals and Congressional Intervention Through Appropriations

In addition to disputes over the textual *definition* of "waters of the United States," disagreement surrounding the technical standards used to *delineate* the boundaries of jurisdictional waters, particularly wetlands, arose in the late 1980s.[104] The Corps issued the first wetlands delineation manual in 1987 (1987 Manual),[105] but EPA published its own manual the following year which utilized an alternative technical analysis.[106] Differences among these and other wetlands manuals led to the preparation of an interagency Federal Manual for Identifying and Delineating Jurisdictional Wetlands in January 1989 (Federal Manual).[107]

Some observers criticized aspects of the Federal Manual, including the methodology it employed for identifying and delineating jurisdictional waters. [108] Some also argued that the Federal Manual

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(...continued)

began utilizing it in 1985 before the Court's decision in *Riverside Bayview Homes* was rendered. *See* Mem. from Francis Blake, Gen. Counsel, Envtl. Prot. Agency, to Richard E. Sanderson, Acting Assistant Admin., Office of External Affairs, Envtl. Prot. Agency on Clean Water Act Jurisdiction Over Isolated Waters (September 13, 1985), 1985 WL 195307, at *2.

[101] *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. at 41,217.

[102] *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. at 41,217; Final Rule: Clean Water Act Section 404 Program Definitions and Permit Exemptions, 54 Fed. Reg. at 20,765.

[103] *See* Clean Water Act Regulatory Programs; Final Rule, 58 Fed. Reg. 45,008, 45,031, 45,036-37 (August 25, 1993).

[104] *See* RALPH E. HEIMLIC ET AL., WETLANDS AND AGRICULTURE, PRIVATE INTERESTS AND PUBLIC BENEFITS, AER-765, 11 (1998).

[105] U.S. ARMY, CORPS OF ENG'RS, TECHNICAL REPORT Y-87-1, WETLANDS DELINEATION MANUAL (1987), *available at* http://www.cpe.rutgers.edu/Wetlands/1987-Army-Corps-Wetlands-Delineation-Manual.pdf. The Corps also created regional supplements to the Wetlands Delineation Manual which are not discussed in this report. *See Regional Supplements to Corps Delineation Manual*, USACE.ARMY.MIL (last visited June 27, 2016, 4:59 p.m.), http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/.

[106] *See* HEIMLIC ET AL., *supra* note 104, at 12 (outlining history of wetlands delineation manuals); *see also* JAMES S. WAKELEY, DEVELOPING A "REGIONALIZED" VERSION OF THE CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL: ISSUES AND RECOMMENDATIONS, ERC/CEL TR-02-20, 2 (2001) (describing differences in manuals).

[107] *See* U.S. DEP'T OF THE INTERIOR, FISH AND WILDLIFE SERV., ET AL., FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS (1989).

[108] *See* 1989 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands"; Proposed Revisions, 56 Fed. Reg. 40,446 (proposed August 14, 1991) (discussing comments to the Federal Manual); Richard H. McNeer, *Nontidal Wetlands Protection in Maryland and Virginia*, 41 MD. L. REV. 105, 113 (1992) (stating the federal manual "was widely criticized for extending federal jurisdiction to areas that are rarely wet").

improperly expanded the scope of federal regulations of wetlands.[109] Disagreements ultimately led to congressional action in 1991 in the form of appropriations legislation that prohibited the Corps from using funds to identify jurisdictional waters using the Federal Manual.[110] The following year, Congress mandated that the Corps use the 1987 Manual until a new manual was published after public notice and comment.[111] The interagency group proposed revisions to the Federal Manual, which received over 100,000 comments,[112] but that proposal was never finalized, and no interagency wetlands manual was created.[113]

Judicially Imposed Limitations Beginning in the Late 1990s

In contrast to the agencies' attempt to align jurisdictional waters with what they interpreted to be outer reaches of the Commerce Clause in the 1980s, a series of court cases beginning in the late 1990s resulted in the Corps and EPA modifying their interpretation of the phrase "waters of the United States." For much of the 20th century,[114] the Supreme Court broadly construed the Commerce Clause to give Congress discretion to regulate activities which "affect" interstate commerce, so long as its legislation was "reasonably" related to achieving its goals of regulating interstate commerce.[115] In the 1995 case of *United States v. Lopez*, however, the Supreme Court

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[109] *See* HEIMLIC ET AL., *supra* note 104, at 12; *see also* WAKELEY, *supra* note 106, at 3 ("[T]he 1989 Federal manual generated almost immediate opposition from groups that believed that the manual expanded the Federal government's regulatory authority into lands previously considered to be non-jurisdictional.").

[110] *See* Energy and Water Development Appropriations Act, 1992, P.L. 102-104, 105 Stat. 510, 518.

[111] *See* Energy and Water Development Appropriations Act, 1993, P.L. 102-377, 106 Stat. 1315, 1324-25. Although the appropriations legislation did not reference EPA, EPA agreed to cease using the Federal Manual and use the 1987 Manual in order to create consistency among the agencies' programs. *See* Clean Water Act Regulatory Programs; Final Rule, Memorandum of Agreement Concerning the Determination of the Geographic Scope of the Section 404 Program, 58 Fed. Reg. 4995 (January 19, 1993).

[112] *See* 1989 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands"; Proposed Revisions, 56 Fed. Reg. at 40,446. For background on the opposition to the proposed revisions to the federal manual, see Flint B. Ogle, Comment, *The Ongoing Struggle Between Private Property Rights and Wetlands Regulation: Recent Developments and Proposed Solutions*, 64 U. COLO. L. REV. 573, 595-96 (1993) and David M. Forman, Comment, *Economic Developments Versus Environmental Protection: Executive Oversight and Judicial Review of Wetland Policy*, 15 HAW. L. REV. 23, 48-49 (1993).

[113] *See* HEIMLIC ET AL., *supra* note 104, at 12. EPA and other agencies have continued to publish wetland guidance documents. *See, e.g.*, ENVTL. PROT. AGENCY, GUIDING PRINCIPLES FOR CONSTRUCTED TREATMENT WETLANDS: PROVIDING FOR WATER QUALITY AND WILDLIFE HABITAT (2000). Because wetland delineation on agricultural properties implicates the Food Security Act and the jurisdiction of Natural Resources Conversation Service within the Department of Agriculture, a separate wetlands delineation manual is used for agricultural lands. *See* WAKELEY, *supra* note 106, at 3.

[114] *See* CRS Report RL32844, *The Power to Regulate Commerce: Limits on Congressional Power*, by Kenneth R. Thomas, at 5 (describing the history of case law interpreting the Commerce Clause including a period of expansive interpretation beginning with *NLRB v. Jones & Laughlin Steel Corporation*, 55 U.S. 1 (1937) and ending with *United States v. Lopez*, 514 U.S. 549 (1995)); *see also* Paul Alexander Fortenberry & Daniel Canton Beck, *Chief Justice Roberts—Constitutional Interpretations of Article III and the Commerce Clause: Will the "Hapless Toad" and "John Q. Public" Have any Protection in the Roberts Court?*, 13 U. BALT. J. ENVTL. L. 55, 74 ("For roughly sixty years [before *United States v. Lopez*], the Supreme Court had broadly construed Congress's Commerce Clause power.").

[115] *See* United States v. Darby, 312 U.S. 100, 118 (1941) (approving that legislation related to working conditions and stating "[t]he power of Congress over interstate commerce ... extends to those activities intrastate which so affect interstate commerce ... to make regulation of them appropriate means to the attainment of a legitimate end[.]"); Wickard v. Filburn, 317 U.S. 111, 124 (1942) (upholding regulations on price of wheat and stating that even if the regulated "activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached (continued...)

struck down a federal statute for the first time in more than 50 years based purely on a finding that Congress exceeded its powers under the Commerce Clause.[116]

In *Lopez*, the Court held the Commerce Clause did not provide a constitutional basis for federal legislation criminalizing possession of a firearm in a school zone because the law neither regulated a commercial activity nor contained a requirement that the firearm possession be connected to interstate commerce.[117] The Court revisited its prior Commerce Clause cases and sorted Congress's commerce power into three categories: (1) regulation of channels of commerce, (2) regulation of instrumentalities of commerce, and (3) regulation of economic activities which not only affect but "substantially affect" interstate commerce.[118] *Lopez* set the backdrop for a series of three major opinions limiting federal jurisdiction under the Clean Water Act.

United States v. Wilson

The United States Court of Appeals for the Fourth Circuit issued the first in the series of decisions limiting the jurisdictional reach of the Clean Water Act in 1997.[119] Following a seven-week jury trial in *United States v. Wilson*, three defendants were convicted of violating Section 404[120] for knowingly discharging fill material into wetland property located approximately 10 miles from the Chesapeake Bay and 6 miles from the Potomac River in Maryland.[121] On appeal, the defendants challenged their conviction on the grounds that the portion of Corps' regulatory definition of "waters of the United States"—which included all "waters ... the use, degradation or destruction of which *could affect* interstate or foreign commerce"—exceeded the Corps' statutory authority in the Clean Water Act and Congress's constitutional authority in the Commerce Clause.[122]

Relying in part on the holding in *Lopez*, the Fourth Circuit agreed with a portion of the defendants' arguments and ordered a new trial.[123] The court reasoned that, under *Lopez*, the regulated conduct must "substantially affect" interstate commerce in order to invoke the Commerce Clause power, and therefore the Corps exceeded its authority by regulating waters which "could affect" interstate commerce without regard to whether there was any actual effect, substantial or otherwise.[124] And although the Fourth Circuit strongly suggested that the Corps' assertion of jurisdiction exceeded the constitutional grant of authority under the Commerce

(...continued)

by Congress if it exerts a substantial economic effect on interstate commerce"); *see also* CRS Report RL32844, *supra* note 114, at 5 (describing history of Commerce Clause cases).

[116] 514 U.S. 549 (1995).

[117] *See id.* at 551.

[118] *See id.* at 558-59.

[119] United States v. Wilson, 133 F.3d 251 (4th Cir. 1997). In *Wilson*, the three-judge panel unanimously agreed that the convictions in the district court should be reversed and remanded for a new trial, and a two-judge majority concluded that a portion of the Corps' regulatory definition of "waters of the United States" exceeded the statutory authorization of the Clean Water Act. *See id.* at 257 (Niemeyer & Payne, JJ. joining in part II of the opinion).

[120] *See* 33 U.S.C. §§1319(c), 1311(a).

[121] *See Wilson*, 113 F. 3d at 254, 256.

[122] *Id.* at 256-57. (quoting 33 C.F.R. §328.3(a)(3)(1993)) (emphasis in opinion but not in regulation).

[123] *See id.* at 255-57.

[124] *See id.*

Clause,[125] it ultimately invalidated the challenged portion of the regulations solely on the ground that it exceeded the congressional authorization under the Clean Water Act.[126]

As *Wilson* never reached the Supreme Court,[127] it was only binding precedent in the Fourth Circuit,[128] and the stricken language remained in the regulations of the Corps and EPA until the release of the Clean Water Rule.[129]

The Corps' 2000 Guidance in Response to *Wilson*

Although the Corps did not modify its regulatory definition of "waters of the United States" in response to *Wilson*, it did publish guidance in March 2000 on the effect of the decision on its Section 404 jurisdiction.[130] The Corps explained that, *within the Fourth Circuit only*, "isolated waters" must be shown to have an *actual* connection to interstate or foreign commerce.[131] "Isolated waters," in Clean Water Act parlance, are waters that are not navigable-in-fact, not interstate, not tributaries of the foregoing, and not hydrologically connected to such waters—but whose use degradation or destruction could affect interstate commerce.[132]

The 2000 guidance also provided clarification on certain nontraditional waters that the Corps considered part of the "waters of the United States." Jurisdictional waters, the Corps explained, included both *intermittent streams*, which have flowing water supplied by groundwater during certain times of the year, and *ephemeral streams*, which have flowing water only during and for a short period after precipitation events.[133] Drainage ditches constructed in jurisdictional waters were also deemed to be subject to the Clean Water Act except when the drainage was so complete that it converted the entire area to dry land.[134]

SWANCC

In 2001, the Supreme Court took up another challenge to the jurisdictional reach of the Clean Water Act in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), revisiting the issue for the first time since its 1995 decision in *Riverside Bayview Homes*. In *SWANCC*, the Court evaluated whether Clean Water Act jurisdiction extended to an abandoned sand and gravel pit which contained water that had become a habitat for migratory

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[125] *See id.* at 257 ("Were this regulation a statute duly enacted by Congress, it would present serious constitutional difficulties, because, at least at first blush, it would appear to exceed congressional authority under the Commerce Clause.").

[126] *See id.*

[127] Following remand, one defendant pled guilty to a single felony county, which it later unsuccessfully attempted to vacate. *See* United States v. Interstate Gen. Co., 152 F. Supp. 2d 843 (D. Md. 2001), *aff'd sub nom.*, United States v. Interstate Gen. Co., L.P., 39 F. App'x 870 (4th Cir. 2002).

[128] *See* Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) ("the decisions of one circuit are not binding on other circuits"); Duran-Quezada v. Clark Constr. Grp., LLC, 582 Fed. Appx. 238, 239 (4th Cir. 2014) ("the decisions of other circuits are not binding").

[129] *See* 33 C.F.R. §328(a)(3) (2014); 40 C.F.R. §122.2 (2014).

[130] *See* Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818 (March 9, 2000).

[131] *See id.* at 12,824 (emphasis added).

[132] *See* CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Claudia Copeland and Alexandra M. Wyatt, at 2-3.

[133] *See* Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. at 12,823, 12,897-98. Under the 2000 Guidance, ephemeral streams must have an ordinary high water mark to be jurisdictional. *Id.* at 12,823.

[134] *See id.* at 12,823.

birds.[135] Citing the legislative history of the 1972 amendments and the Clean Water Act of 1977, the Corps had argued that the Clean Water Act can extend to such isolated waters under the Migratory Bird Rule.[136]

In a 5-4 ruling, the Court rejected the Corps' position, and held that the Corps' assertion of jurisdiction over isolated waters based purely on their use by migratory birds exceeded its statutory authority.[137] The *SWANCC* Court's conclusion was informed, in part, by *Lopez* and another landmark Commerce Clause decision issued five years later, *United States v. Morrison*,[138] in which the Court held that Congress lacked constitutional authority under the Commerce Clause to enact portions of the Violence Against Women Act.[139] In light of this jurisprudence, the *SWANCC* Court concluded that allowing the Corps to assert jurisdiction under the Migratory Bird Rule raised "serious constitutional questions" about the limits of Congress's authority and "would result in significant impingement of States' traditional and primary power of land and water use."[140] Rather than interpret the Clean Water Act in a way that would implicate these "significant constitutional and federalism questions[,]" the Court concluded that Congress's use of the phrase "navigable waters" in the Clean Water Act "has at least the import of showing us what Congress had in mind for enacting the [Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made so."[141] Based on this reading, the Court concluded that Congress did not intend to invoke the outer limits of the Commerce Clause in the Clean Water Act, and the Corps could not rely on the Migratory Bird Rule asa basis for jurisdiction.[142]

In contrast to *Riverside Bayview Homes*, the *SWANCC* Court focused less on the legislative history of the Clean Water Act, and instead emphasized the Corps' original interpretation of the 1972 amendments in which it limited its jurisdiction to navigable-in-fact waters.[143] Although the *Riverside Bayview Homes* Court found that classical "navigability" was of "limited import" in determining Clean Water Act jurisdiction,[144] the *SWANCC* Court distinguished that case as focused on "wetlands adjacent to navigable waters."[145] The ponds which formed in the abandoned gravel pits in *SWANCC* were "*not* adjacent to open water[,]" and therefore lacked the requisite "significant nexus" to traditionally navigable waters necessary for jurisdiction under the Clean Water Act.[146]

SWANCC did not go as far as the Fourth Circuit, however, in striking down an entire subsection of the definition of "waters of the United States." It limited its holding to the Migratory Bird

[135] *See* 531 U.S. 159, 162 (2001).

[136] *See id* at 168-70.

[137] *Id.* at 173-74.

[138] 529 U.S. 598, 627 (2000) (affirming decision holding that Congress lacked constitutional authority to enact 42 U.S.C. §13981 (2000)).

[139] *See SWANCC*, 531 U.S. at 173 (citing *Lopez* and *Morrison* and stating "[t]wice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.").

[140] *See id.* at 173-74.

[141] *See id.* at 172-74.

[142] *See id.*

[143] *See id.* at 168 (quoting 33 C.F.R. §209.120(d)(1) (1974)).

[144] United States v. Riverside Bayview Homes, Inc. 474 U.S. 121, 133 (1985).

[145] *See SWANCC*, 531 U.S. at 167-68.

[146] *See id.* at 167 (emphasis in original).

Rule, which was described in the Corps' guidance as an effort to "clarify" the definition.[147] But while its direct holding was arguably narrow, *SWANCC*'s rationale was much broader and called into question whether the Corps and EPA could assert jurisdiction under the Clean Water Act over many wholly intrastate isolated waters.[148] The relationship between *SWANCC*'s limited holding and the Court's broader rationale generated considerable litigation over the scope of the Clean Water Act.[149]

Agency Guidance in Response to *SWANCC*

The general counsels for the Corps and EPA added their voices to the post-*SWANCC* debate in a joint memorandum issued on the last full day of the Clinton Administration, January 19, 2001.[150] Combining the "significant nexus" language from *SWANCC* with the existing regulatory definition of "waters of the United States," the agencies concluded that they could continue to exercise jurisdiction over isolated waters so long as the use, degradation, or destruction of those waters could affect other "waters of the United States."[151] The potential effect on or degradation on existing jurisdictional waters, the agencies reasoned, established the "significant nexus" mentioned in *SWANCC*.[152]

In January 2003, the Corps and EPA issued a notice of proposed rulemaking regarding how field staff should address jurisdictional issues in the Clean Water Act and which contained a revised joint memorandum on the effect of *SWANCC*.[153] That proposed rulemaking effort was later abandoned, leaving unanswered questions over the agencies' jurisdiction over isolated waters after *SWANCC*.[154] These uncertainties caused the Corps and EPA to shift their attention to alternative bases for jurisdiction in defining "waters of the United States"—such as "adjacent wetlands"—and set the stage for the Supreme Court's next encounter with a Clean Water Act jurisdictional dispute in *Rapanos v. United States*.

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[147] *See SWANCC*, 531 U.S. at 174.

[148] *See* Advanced Notice of Proposed Rulemaking on the Clean Water Regulatory Definitions of "Waters of the United States," 68 Fed. Reg. 1991, 1996 (January 15, 2003) (discussing "uncertainties after *SWANCC* concerning jurisdiction over isolated waters that are both intrastate and non-navigable"). Justice Stevens wrote in his dissent that *SWANCC* precluded jurisdiction "over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each." *See SWANCC*, 531 U.S. at 176-77 (Stevens, J., dissenting).

[149] *See* Robert R. Rm. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845, 846 (2004) (describing *SWANCC* as sending the Corps into a "tailspin" of litigation).

[150] Joint Memorandum from Gary S. Guzy, General Counsel, U.S. Envtl. Prot. Agency, and Robert M. Andersen, Chief Counsel, U.S. Army Corps of Eng'rs on Supreme Court Rule Concerning CWA Jurisdiction Over Isolated Waters (January 19, 2001) [hereinafter 2001 Joint Memorandum], *available* at https://www.environment.fhwa.dot.gov/ecosystems/laws_swepacoe.asp.

[151] *See id.* at 3.

[152] *See id.* ("With respect to waters that are isolated, intrastate, and nonnavigable—jurisdiction may be possible if their use, degradation, or destruction could affect other 'waters of the United States,' thus establishing a significant nexus between the water in question and other 'waters of the United States[.]").

[153] *See* Advanced Notice of Proposed Rule Making on the Clean Water Regulatory Definitions of "Waters of the United States," 68 Fed. Reg. at 1991, 1995 app. A.

[154] *See* Rapanos v. United States, 547 U.S. 715, 758 (2006) (Kennedy, J., concurring) ("The proposed rulemaking went nowhere.").

Rapanos

Rapanos involved a consolidation of two cases on appeal from the Sixth Circuit—*Rapanos*[155] and *Carabell*[156]—both of which involved disputes over the breadth of the Clean Water Act's jurisdiction over "adjacent wetlands." In *Carabell*, landowners challenged whether Section 404 jurisdiction extends to "wetlands that are hydrologically isolated from any of the 'waters of the United States[,]'"[157] and *Rapanos* presented the similar question of whether this jurisdiction includes nonnavigable wetlands "that do not even abut a navigable water."[158] In both cases, which are collectively referred to as *Rapanos*, the Sixth Circuit upheld the Corps' assertion of jurisdiction over the wetland property at issue.[159]

Many anticipated that *Rapanos* would provide clarity on the disputes following *SWANCC*.[160] And although a majority of five Justices agreed that the Sixth Circuit decision was flawed, they were not able to agree on a single, underlying standard which would govern future jurisdictional disputes. Instead, a four-Justice plurality opinion, authored by Justice Scalia, and an opinion by Justice Kennedy, writing only for himself, proposed two alternative tests for determining jurisdictional waters.

The Competing Approaches Following *Rapanos*

The Plurality's Bright-Line Rule: Writing for a four-Justice plurality, Justice Scalia adopted the bright-line rule that the word "waters" in "waters of the United States" means only "relatively permanent, standing or continuously flowing bodies of water"—that is, streams, rivers, and lakes.[161] Wetlands could also be included, but only when they have a "continuous surface connection" to other "waters of the United States."[162]

Justice Kennedy's "Significant Nexus" Test: In a separate concurring opinion, Justice Kennedy concluded that the Clean Water Act requires a more malleable approach: the Corps should determine, on a case-by-case basis, whether the water in question possesses a "significant nexus" to waters that are navigable-in-fact.[163] For wetlands, a significant nexus exists when the wetland, either alone or in connection with similarly situated properties, significantly impacts the chemical, physical, and biological integrity of a traditionally navigable waterbody.[164]

[155] Rapanos v. United States, 376 F.3d 629 (6th Cir. 2004), *cert. granted*, 546 U.S. 932-33 (2005).

[156] Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, 546 U.S. 932-33 (2005).

[157] Questions Presented, U.S. Army Corps of Eng'rs, No. 04-1384, 547 U.S. 715 (2006), available at http://www.supremecourt.gov/qp/04-01384qp.pdf.

[158] Questions Presented, Rapanos v. United States, No. 04-1034, 547 U.S. 715 (2006), available at http://www.supremecourt.gov/qp/04-01034qp.pdf.

[159] *See Rapanos*, 547 U.S. at 729-30.

[160] *See, e.g.*, Gregory T. Broderick, *From Migratory Birds to Migratory Molecules: The Continuing Battle over the Scope of Federal Jurisdiction Under the Clean Water Act*, 30 COLUM. J. ENVTL. L. 473, 522 (2004) ("With the lower courts in conflict and the political branches unable to move on this important question [of CWA jurisdiction,] only the Supreme Court can fix the problem."); CRS Report RL33263, *supra* note 132, at 5 ("For many who had waited so long to have 'waters of the United States' clarified, the *Rapanos* decision ... was a disappointment.").

[161] *See Rapanos*, 547 U.S. at 739.

[162] *See id.* at 742.

[163] *See id.* at 782 (Kennedy, J., concurring).

[164] *See id.* at 780.

Lower Courts' Response to *Rapanos*

With no controlling rationale from the majority, lower courts interpreting *Rapanos* struggled with the question of what analysis to apply in Clean Water Act jurisdictional disputes.[165] Of the nine circuits which have addressed the issue thus far,[166] all have applied Justice Kennedy's significant nexus test either alone or in combination with the plurality's test, and none have applied the plurality approach alone.[167] Still, some courts and observers have criticized the significant nexus test as vague and difficult to implement.[168]

Agency Guidance in Response to *Rapanos*

The Corps and EPA offered their own interpretation of *Rapanos* through guidance to field officers in 2007,[169] which was revised and replaced after public comment in 2008.[170] The 2008 guidance

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[165] In his brief concurrence, Chief Justice Roberts predicted difficulties in implementing *Rapanos*, stating the following: "It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will not have to feel their way on a case-by-case basis." *See id.* 547 U.S. at 758 (Roberts, C.J., concurring). For a more detailed analysis of lower courts' varying interpretations of *Rapanos*, see CRS Report RL33263, *supra* note 132, at 7-8 and Technical Support for the Clean Water Rule, *supra* note 5, at 40-47.

[166] *See* Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, 633 F.3d 278 (4th Cir. 2011); United States v. Donovan, 661 F.3d 174 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2409 (2012); United States v. Bailey, 571 F.3d 791 (8th Cir. 2009); United States v. Cundiff, 555 F.3d 200 (6th Cir.), *cert. denied*, 130 S. Ct. 74 (2009); United States v. Lucas, 516 F.3d 316 (5th Cir.), *cert. denied*, 555 U.S. 822 (2008); United States v. Robison, 505 F.3d 1208 (11th Cir. 2007), *cert. denied sub nom* McWane v. United States, 555 U.S. 1045 (2008); N. Cal. River Watch v. City of Healdsburg,496 F.3d 993 (9th Cir. 2007) (superseding the original opinion published at 457 F.3d 1023 (9th Cir. 2006)), *cert. denied*, 552 U.S. 1180 (2008); United States v. Johnson, 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007); United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006), *cert. denied*, 552 U.S. 810 (2007).

[167] When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, the holding of the Court which lower courts must follow "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds...." Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Some courts have concluded that Justice Kennedy's "significant nexus" test is the narrowest ruling to be derived from *Rapanos*. *See Gerke Excavating, Inc.* 464 F.3d at 725 ("[A]s a practical matter the Kennedy concurrence is the least common denominator[.]"); *Robison*, 505 F.3d at 1222 ("[P]ursuant to *Marks*, we adopt Justice Kennedy's 'significant nexus' test as the governing definition of 'navigable waters' under *Rapanos*."). Others courts interpreted *Marks* to conclude "that two new tests should apply." *Donovan*, 661 F.3d at 183-84; *accord Bailey*, 571 F.3d at 799; *Johnson,* 467 F.3d at 66.

For more background on the differing circuit court approaches, see CRS Report RL33263, *supra* note 132, at 7-8 and Technical Support for the Clean Water Rule, *supra* note 5, at 40-47.

[168] *See*, *e.g.*, United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605 (N.D. Tex. 2006) ("This test leaves no guidance on how to implement its vague, subject centerpiece."); Annie Snider, *The Two Words that Rewrote American Water Policy*, POLITICO (May 25, 2016), http://www.politico.com/agenda/story/2016/05/obama-wotus-wetlands-rule-supreme-court-000131 ("[A]s definitive as those words [significant nexus] sound, the real problem was—and still is—that nobody has ever known quite what they were supposed to mean."); Lowell M. Rothschild, *The Practical Application of the Significant Nexus Test: The Final Waters of the US Rule*, NAT. L. REV. (June 8, 2015), http://www.natlawreview.com/article/practical-application-significant-nexus-test-final-waters-us-rule ("[T]he significant nexus test ... is an ambiguous, case-by case test.").

[169] Mem. from Envtl. Prot. Agency & Dep't of the Army on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (June 5, 2007), *available at* https://www.epa.gov/sites/production/files/2016-04/documents/rapanosguidance6507.pdf.

[170] Revised Mem. from Envtl. Prot. Agency & Dep't of the Army on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (December 2, 2008) [hereinafter 2008 Memorandum], available at https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

adopts the view taken by some lower courts[171] that jurisdiction exists over any water body that satisfies *either* the plurality approach *or* the significant nexus test.[172] The agencies further deconstructed the jurisdictional analysis into three categories: (1) waters that are categorically jurisdictional; (2) waters that may be deemed jurisdictional on a case-by-case basis; and (3) waters that are excluded from jurisdiction under the Clean Water Act.[173]

Joint Guidance in Response to *Rapanos*

The Corps and EPA issued joint guidance in 2008 in which they reorganized the jurisdictional analysis into three types of waters:

(1) Waters that are categorically "waters of the United States," including navigable-in-fact waters, "relatively permanent" tributaries, and wetlands that have a continuous surface connection or unbroken hydrological connection to jurisdictional waters;

(2) Waters that may be deemed "waters of the United States" on a case-by-case basis upon a finding of a significant nexus with other jurisdictional waters, such as intermittent and ephemeral streams and wetlands that do not meet the criteria above; and

(3) Waterbodies that are excluded from "waters of the United States," including swales or gullies and ditches wholly in and draining only upland that do not carry a relatively permanent flow of water.[174]

In 2011, the Corps and EPA sought comments on proposed changes to the 2008 guidance, which the agencies acknowledged would increase the number of waters regulated under the Clean Water Act in comparison to its earlier post-*Rapanos* guidance.[175] According to the agencies, the 2011 draft guidance was focused on protecting smaller waters that feed into larger ones in an effort to keep downstream water safe from upstream pollutants.[176] The potential enlargement of jurisdiction spawned congressional attention, including a letter signed by 41 Senators requesting that the agencies abandon the effort.[177] Prohibitions on funding related to the draft guidance were included in several appropriations bills, but those provisions were never enacted.[178] Instead, the agencies abandoned pursuit of the 2011 draft guidance in favor of their most recent effort at defining the scope of "waters of the United States," the Clean Water Rule.

[171] *See* United States v. Donovan, 661 F.3d 174 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2409 (2012); United States v. Bailey, 571 F.3d 791 (8th Cir. 2009); United States v. Johnson, 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007).

[172] 2008 Memorandum, *supra* note 170, at 3.

[173] *See id.* at 4-11.

[174] *See id.*

[175] *See* EPA and Army Corps of Eng'rs. Guidance Regarding Identification of Waters Protected by the Clean Water Act, 76 Fed. Reg. 24,479 (May 2, 2011) ("The agencies believe that under this proposed guidance the number of waters identified as protected by the Clean Water Act will increase compared to current practice....").

[176] *See* CRS Report RL33263, *supra* note 132, at 12 (discussing the 2011 draft guidance).

[177] *See* Letter from Sen. James Inhofe et al. to Lisa P. Jackson & Jo-Ellen Darcy (June 30, 2011), *available at* http://www.epw.senate.gov/public/_cache/files/ec609d07-a036-49e8-a8a0-c46652b479bd/110630-jackson-darcy-cwa-guidance.pdf.

[178] See H.R. 4923, 113th Cong. §106; H.R. 2584, 112th Cong. §435; H.R. 6061, 112th Cong. §434; see also CRS Report R43455, *EPA and the Army Corps' Rule to Define "Waters of the United States"*, by Claudia Copeland, at 1-2 (discussing legislative proposals to bar EPA and the Corps from implementing the 2011 proposed guidance or developing regulations based on it).

The Clean Water Rule

The Clean Water Rule marks the culmination of the Corps' and EPA's effort to clarify the bounds of jurisdictional waters in the wake of *SWANCC* and *Rapanos*.[179] In developing the Rule, the agencies relied on a synthesis of more than 1,200 published and peer-reviewed scientific reports related to the current scientific understanding of the connection or isolation of streams and wetlands relative to large water bodies like rivers, lakes, estuaries, and oceans.[180] After receiving over 1 million comments to a proposed version of the rule, the agencies issued the final Clean Water Rule on May 27, 2015.[181]

The final version contains the same three-tier structure from the agencies' 2008 joint guidance, identifying waters that are (1) categorically jurisdictional, (2) may be deemed jurisdictional on a case-by-case basis if they have a significant nexus with other jurisdictional waters, and (3) categorically excluded from the Clean Water Act's jurisdiction.[182] A significant impetus behind the Clean Water Rule was an effort to remove the uncertainty for the landowner and administrative burden to the Corps and EPA created when individual waters and wetlands are evaluated on a case-by-case basis.[183] To that end, the new rule increases categorical determinations as to whether certain property contains "waters of the United States."[184]

[179] *See* Proposed Rule, Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed April 21, 2014) (discussing background for proposed Clean Water Rule).

[180] *See* Final Rule, Clean Water Rule, Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,057 (June 29, 2015) [hereinafter Clean Water Rule].

[181] *See id.* EPA extended the public comment period on two occasions. *See* Proposed Rule; Extension of Comment Period, 79 Fed. Reg. 35,712 (June 24, 2014) (extending public comment period to October 20, 2014); Proposed Rule; Extension of Comment Period, 79 Fed. Reg. 61,590 (October 14, 2014) (extending public comment period to November 14, 2014).

[182] *See* Clean Water Rule, 80 Fed. Reg. at 37,057.

[183] *See id.* ("This rule replaces existing procedures that often depend on individual, time-consuming, and inconsistent analyses of the relationship between [waters.]"); *What the Clean Water Rules Does*, EPA (May 18, 2016), https://www.epa.gov/cleanwaterrule/what-clean-water-rule-does ("The rule significantly limits the use of case-specific analysis by creating clarity and certainty on protected waters and limiting the number of similarly situated water features.").

[184] *See* Clean Water Rule, 80 Fed. Reg. at 37,057 ("The agencies have greatly reduced the extent of waters subject to this individual review...."); Richard M. Glick and Diego Atencio, *"Waters of the United States" Not Quite Clear Yet*, WATER REP., July 15, 2016, at 3 ("The new rule increases categorical jurisdictional determinations, and is intended to minimize the need for case-specific analyses.").

Key Provisions of the Clean Water Rule[185]

- Navigable waters, interstate waters, the territorial seas, or impoundments of such waters are categorically jurisdictional.
- Tributaries—as newly defined in the Clean Water Rule[186]—of traditional navigable waters, interstate waters, and the territorial seas are categorically jurisdictional.
- Waters, including wetlands, lakes, ponds, and "similar waters," that are adjacent to traditional navigable waters, interstate waters, and the territorial seas are categorically jurisdictional.
- Some waters would remain subject to a case-specific evaluation as to whether they have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas.
- A number of waters would be categorically excluded from Clean Water Act jurisdiction, including prior converted cropland, groundwater and certain ditches, and stormwater management systems.

Response to the Clean Water Rule

Many reported that the Clean Water Rule was met with controversy,[187] and a Government Accountability Office (GAO) report found that EPA violated publicity or propaganda and antilobbying provisions in prior appropriations acts through its promotion of the Clean Water Rule on social media.[188] Congress also took steps to block its implementation. In January 2016, the Senate and House passed a resolution of disapproval seeking to nullify the Clean Water Rule[189] under the Congressional Review Act;[190] but that resolution was vetoed by the President.[191] On January 21, 2016, a procedural vote in the Senate to override the veto failed.[192]

The Clean Water Rule was scheduled to take effect on August 28, 2015,[193] however, numerous lawsuits were filed soon after it was announced.[194] While EPA and the Corps contend that the Clean Water Rule governs only waters that have historically been covered by the Clean Water

[185] *See* Clean Water Rule 80 Fed. Reg. at 37,057-59 (discussing "Major Rule Provisions" and summarizing other elements of the Clean Water Rule); *id.* at 37,104-06 (redefining "waters of the United States" in 33 C.F.R. §329.3) *see also* CRS In Focus IF10125, *Overview of EPA and the Army Corps' Rule to Define "Waters of the United States"*, by Claudia Copeland, at 1. The details of the Clean Water Rule are also discussed in CRS Report R43455, *EPA and the Army Corps' Rule to Define "Waters of the United States"*, by Claudia Copeland.

[186] *See Clean Water Rule*, 80 Fed. Reg. at 37,105.

[187] *See, e.g., id.* at 14 ("The rule was controversial even before it was proposed in March 2014, and controversies have persisted since the final rule was issued"); Snider, *supra* note 168 ("When the Obama administration released [the Clean Water Rule] in early summer 2015, it detonated across the American heartland like a bomb.").

[188] *See* U.S. Gov't Accountability Office, GAO B-326944, Environmental Protection Agency—Application of Publicity or Propaganda and Anti-Lobbying Provisions 26 (2015), *available at* http://www.gao.gov/assets/680/674163.pdf.

[189] *See* S.J.Res. 22, 114th Cong. (2016).

[190] *See* 5 U.S.C. §§801-808.

[191] *See* U.S. President (Obama), Veto Message from the President (January 19, 2016), available at https://www.whitehouse.gov/the-press-office/2016/01/19/president-obama-vetoes-sj-22.

[192] *See* U.S. Senate, Roll Call Votes on the Motion to Invoke Cloture on the Veto Message to Accompany S.J.Res. 22 (January 21, 2016), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=2&vote=00005#top.

[193] *See* Clean Water Rule, 80 Fed. Reg. at 37,054.

[194] *See* CRS Report RL33263, *supra* note 132, at 15; *see also* Amena H. Saiyid, *Litigation Tracker: Water Rule Challenges Dominate Courts*, BNA, July 26, 2016, http://news.bna.com/wrrn/WRRNWB/split_display.adp?fedfid=94728872&vname=wrrnotallissues&wsn=499592500&searchid=28123244&doctypeid=1&type=date&mode=doc&split=0&scm=WRRNWB&pg=0 (summarizing nationwide challenges to the Clean Water Rule in various courts).

Act,[195] its opponents argue it constitutes an unlawful expansion of authority beyond that which is allowed by the act or the Constitution and which is over-burdensome to private landowners.[196]

In one lawsuit, the U.S. Court of Appeals for the Sixth Circuit issued an order staying its implementation as of October 9, 2015.[197] The agencies have since stated that they intend to defend the Clean Water Rule until a final decision is reached by the courts, but that they will apply their prior regulations during the pendency of the stay.[198]

The most recent action related to the Clean Water Rule and jurisdictional waters occurred on July 14, 2016, when the House passed its version of the FY2017 Interior and Environment Appropriations Act.[199] That bill, as passed by the House, would prohibit the use of appropriated funds to adopt or enforce any change to jurisdictional waters beyond those that were in effect on October 1, 2012.[200]

[195] *See* Envtl. Prot. Agency & U.S. Army Corps of Eng'rs., Factsheet, Clean Water Rule, https://www.epa.gov/sites/production/files/2015-05/documents/fact_sheet_summary_final_1.pdf.

[196] *See*, *e.g.*, Snider, *supra* note 163 (describing opposition and legal challenges to the Clean Water Act); Press Release, U.S. Speaker of the House, Speaker Boehner on the Latest EPA Power Grab (May 27, 2015), http://www.speaker.gov/press-release/speaker-boehner-latest-epa-power-grab (calling the Clean Water Rule a "raw and tyrannical power grab").

[197] *See* Ohio v. U.S. Army Corps of Eng'rs., 803 F.3d 804 (6th Cir. 2015). More information on the current status of this litigation is available through CRS Legal Sidebar WSLG1503, *UPDATED: Sixth Circuit Will Hear Challenges to EPA's Clean Water Act Jurisdiction ("Waters of the United States") Rule, but Litigation Uncertainties Remain Unresolved*, by Alexandra M. Wyatt.

[198] *See* Mem. from Envtl. Prot. Agency & Dep't of the Army on Administration of Clean Water Programs in Light of the Stay of the Clean Water Rule; Improving Transparency and Strengthening Coordination (November 16, 2015), at 1-2, *available at* https://www.epa.gov/sites/production/files/2015-11/documents/2015-11-16_signed_cwr_post-stay_coordination_memo.pdf.

[199] *See* H.R. 5538, 114th Cong. (2016).

[200] *See id.* at §427.

Appendix. Table Concerning Major Federal Actions Related to "Waters of the United States" in the Clean Water Act

Table A-1. Major Federal Actions Related to "Waters of the United States" in the Clean Water Act

Date	Event	Source
Oct. 18, 1972	Federal Water Pollution Control Act Amendments of 1972 is enacted	P.L. 92-500, 86 Stat. 816
Feb. 6, 1973	EPA interprets the scope of Clean Water Act jurisdiction in an Office of the General Counsel Memorandum	1973 WL 21937
May 4, 1973	The Corps proposes its first regulations defining "navigable waters" under the Clean Water Act	38 Fed. Reg. 12,217
May 22, 1973	EPA issues regulations defining "navigable waters" under the Clean Water Act[201]	38 Fed. Reg. 13,528
April 1, 1974	The Corps issues final regulations defining "navigable waters" under the Clean Water Act	39 Fed. Reg. 12,115
Mar. 27, 1975	The U.S. District Court for the District of Columbia strikes down the Corps' regulatory definition in *National Resources Defense Council v. Callaway*	392 F. Supp. 685
May 6, 1975	The Corps publishes proposed regulations in response to *Callaway*	40 Fed. Reg. 19,766
July 25, 1975	The Corps publishes final interim regulations revising the definition of "navigable waters"	40 Fed. Reg. 31,320
July 19, 1977	The Corps publishes a final rule defining "waters of the United States"	42 Fed. Reg. 37,122
Dec. 27, 1977	The Clean Water Act of 1977 is enacted	P.L. 95-217, 91 Stat. 1566
Aug. 28. 1975	EPA adopts the Corps' definition of "navigable waters" under the Section 404 program	40 Fed. Reg. 41,292
Sept. 5, 1979	Attorney General Ben Civiletti publishes opinion that EPA has ultimate responsibility to determine jurisdictional waters	43 Op. Att'y Gen. 197
May 19, 1980	EPA publishes a Final Rule defining "waters of the United States"	45 Fed. Reg. 33,290
Sept. 19, 1980	The Corps issues a proposed rule with a definition of "waters of the United States" that continues to differ from EPA	45 FR 62,732
July 22, 1982	The Corps issues an interim final rule adopting EPA's definition of "waters of the United States"	47 FR 31,794

[201] For purposes of this table, the Clean Water Act refers to the Federal Water Pollution Control Act Amendments of 1972 and subsequent amendments and related legislation.

Date	Event	Source
Sept. 13, 1985	EPA's General Counsel writes a memorandum on the applicability of the Migratory Bird Rule	1985 WL 195307
Dec. 4, 1985	The Supreme Court decides *United States v. Riverside Bayview Homes, Inc.*	474 U.S. 121
Nov. 13, 1986	The Corps issues guidance adopting the Migratory Bird Rule	51 Fed. Reg. 41,206
June 6, 1988	EPA publishes guidance adopting the Migratory Bird Rule	53 Fed. Reg. 20,764
Jan. 1987	The Corps publishes the first wetlands delineation manual	http://www.cpe.rutgers.edu/Wetlands/1987-Army-Corps-Wetlands-Delineation-Manual.pdf
April 1988	EPA publishes a wetlands delineation manual	http://www.ers.usda.gov/media/929243/aer765_002.pdf[202]
Jan. 10, 1989	An interagency group publishes a federal wetlands delineation manual	https://www.fws.gov/northeast/ecologicalservices/pdf/wetlands/interagency%20wetland%20delineation%20manual%201989.pdf
Jan. 19, 1989	The Corps and EPA execute a Memorandum of Agreement regarding their respective jurisdiction under Section 404	http://www.usace.army.mil/Portals/2/docs/civilworks/mous/enfmoa.pdf
Aug. 14, 1991	An interagency group proposes revisions to the 1989 federal wetlands delineation manual	56 Fed. Reg. 40,446
Aug. 17, 1991	Appropriations legislation is passed prohibiting the Corps from using the 1989 federal wetlands delineation manual	P.L. 102-104, 105 Stat. 510
Oct. 2, 1992	Appropriations legislation is passed requiring the Corps to use the 1987 wetlands delineation manual	P.L. 102-377, 106 Stat. 1315
Jan. 19, 1993	EPA ceases to use the 1989 federal wetlands delineation manual, and instead uses the Corps' 1987 manual	58 Fed. Reg. 4995
Aug. 25, 1993	The Corps and EPA revise regulations to exclude "prior converted cropland" from "waters of the United States"	58 Fed. Reg. 45,008
Dec. 23, 1997	The Fourth Circuit invalidates a portion of the Corps' definition of "waters of the United States" in *United States v. Wilson*	133 F.3d 251
Mar. 9, 2000	The Corps publishes guidance on the effect of *Wilson* and on other nontraditional "waters of the United States" including ephemeral streams, intermittent streams, and drainage ditches	65 Fed. Reg. 12,818

[202] The 1988 EPA manual is no longer publically disseminated or available on EPA's website; however, several secondary sources discuss the manual. *See*, *e.g.*, HEIMLIC ET AL., *supra* note 104, at 11-12; WAKELEY, *supra* note 106, at 3.

Date	Event	Source
Jan. 9, 2001	The Supreme Court holds that the Corps cannot exercise jurisdiction over waters or wetlands based solely on the Migratory Bird Rule in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*)	531 U.S. 159
Jan. 19, 2001	The general counsels of the Corps and EPA issue a joint memorandum on the on the effect of *SWANCC*	https://www.environment.fhwa.dot.gov/ecosystems/laws_swepacoe.asp
Jan. 15, 2003	The Corps issues proposed rulemaking addressing how field staff should address jurisdictional waters issues, but it is never finalized	68 Fed. Reg. 1991
June 19, 2006	The Supreme Court decides *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*	547 U.S. 715
June 5, 2007	The Corps and EPA issue joint guidance on the impact of *Rapanos*	https://www.epa.gov/sites/production/files/2016-04/documents/rapanosguidance6507.pdf
Dec. 2, 2008	The Corps and EPA revise the joint guidance on *Rapanos*	https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf
May 2, 2011	The Corps and EPA seek comments on proposed guidance which would increase the number of waters regulated under the Clean Water Act; the proposed guidance is never finalized	76 Fed. Reg. 24,479
April 21, 2014	The Corps and EPA issue the proposed Clean Water Rule	79 FR 22,188
June 29, 2015	The Corps and EPA issue the final Clean Water Rule	80 FR 37,053
Oct. 9, 2015	The U.S. Court of Appeals for the Sixth Circuit stays the application off the Clean Water Rule	803 F.3d 804
Nov. 16, 2015	The Corps and EPA issue a joint memorandum regarding their approach to resolving jurisdictional waters issues during the stay of the Clean Water Rule	https://www.epa.gov/sites/production/files/2015-11/documents/2015-11-16_signed_cwr_post-stay_coordination_memo.pdf
Jan. 13, 2016	Senate and House pass resolution of disapproval, S.J.Res. 22, seeking to nullify the Clean Water Rule	S.J.Res. 22, 114th Cong.
Jan. 19, 2016	The President vetoes S.J.Res. 22	https://www.whitehouse.gov/the-press-office/2016/01/19/president-obama-vetoes-sj-22
Jan. 21, 2016	A procedural vote to override the President's veto of S.J.Res. 22 fails in the Senate	http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=2&vote=00005#top
July 14, 2016	The House passes its version of the FY2017 Interior and Environment Appropriations Bill, which contains a provision that would prohibit the use of appropriated funds to adopt or enforce a change to jurisdictional waters beyond those that were in effect on October 1, 2012	H.R. 5538, §427, 114th Cong.

Source: Congressional Research Service; based on sources cited in this report.

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EPA REGULATORY DEFINITIONS
40 CFR 230.3

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency
Subchapter H. Ocean Dumping
Part 230. Section 404(b)(1) Guidelines for Specification or Disposal Sites for Dredged or Fill Material
Subpart A. General

→ § 230.3 Definitions.

For purposes of this part, the following terms shall have the meanings indicated:

(a) The term Act means the Clean Water Act (also known as the Federal Water Pollution Control Act or FWPCA) Pub.L. 92-500, as amended by Pub.L. 95-217, 33 U.S.C. 1251, et seq.

(b) The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands."

***

(r) The term territorial sea means the belt of the sea measured from the baseline as determined in accordance with the Convention on the Territorial Sea and the Contiguous Zone and extending seaward at a distance of three miles.

(s) The term waters of the United States means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(t) The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

[58 FR 45037, Aug. 25, 1993]

SOURCE: 45 FR 85344, Dec. 24, 1980, unless otherwise noted.

AUTHORITY: Secs. 404(b) and 501(a) of the Clean Water Act of 1977, (33 U.S.C. § 1344(b) and § 1361(a)).

40 C. F. R. § 230.3, 40 CFR § 230.3

Current through June 3, 2010; 75 FR 31661

ADMINISTRATIVE AUTHORITY TO CONSTRUE § 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT

The Administrator of the Environmental Protection Agency rather than the Secretary of the Army has ultimate administrative authority to construe the jurisdictional term "navigable waters" under § 404 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1344.

Similarly, the Administrator of the Environmental Protection Agency rather than the Secretary of the Army has ultimate administrative authority to construe § 404(f) of that Act, 33 U.S.C. § 1344(f).

"Civiletti Memorandum"
43 Op. Att'y. Gen. 197 (1979)

SEPTEMBER 5, 1979.

THE SECRETARY OF THE ARMY.

MY DEAR MR. SECRETARY: I am responding to your letter of March 29, 1979, requesting my opinion on two questions arising under § 404 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1344. You asked whether the Act gives the ultimate administrative authority to determine the reach of the term "navigable waters" for purposes of § 404 to you, acting through the Chief of Engineers, or to the Administrator of the Environmental Protection Agency; and similarly you ask whether the Act gives the ultimate administrative authority to determine the meaning of § 404(f) to you or to the Administrator. Although no specific provision in the Federal Water Pollution Control Act or specific statement in its legislative history speaks directly to your questions, I am convinced after careful consideration of the Act as a whole that the Congress intended to confer upon the administrator of the Environmental Protection Agency the final administrative authority to make those determinations. Before turning to the specific reasons for my conclusions, I believe that some background description is in order.

The basic objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As one means of achieving that objective, the Act makes the discharge of any pollutant unlawful except in accordance with standards promulgated or permits issued under the act. 33 U.S.C. § 1311(a). Permits for the discharge of pollutants may be ob-

tained under §§ 402 and 404 of the Act, 33 U.S.C. §§ 1342, 1344, if certain requirements are met. The administrator of the Environmental Protection Agency and the Secretary of the Army, acting through the Chief of Engineers, share responsibility for issuance of those permits and enforcement of their terms. The Administrator issues permits for point source discharges under the National Pollutant Discharge Elimination System (NPDES) program established by § 402; the Secretary of the Army issues permits for the discharge of dredged or fill material under § 404.[1]

During consideration of the legislative proposals that resulted in the Federal Water Pollution Control Act Amendments of 1972, the question whether the Secretary should play any role, through the Chief of Engineers, in issuing permits was hotly debated. The bill introduced in the Senate, S. 2770, gave the Administrator the authority to issue permits and treated discharges of dredged or fill material no differently from discharges of any other pollutant. During consideration of the bill both by the Senate Public Works Committee[2] and on the Senate floor,[3] amendments were proposed to give the authority to issue permits for discharges of dredged or fill material to the Secretary of the Army. These amendments were offered in recognition of the Secretary's traditional responsibility under the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 401 *et seq.*, to protect navigation, including the responsibility to regulate discharges into the navigable waters of the United States. Concerned that the Secretary would have insufficient expertise to evaluate the environmental impact of a proposed dredge

[1] A point source is defined in the Act as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft. . . ." 33 U.S.C. § 1362(14).

Dredged and fill material are not defined in the Act, but are defined in regulations promulgated by the Corps of Engineers: Dredged material is "material that is excavated or dredged from waters of the United States," while fill material is "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body." 33 CFR § 323.2 (k),(m).

[2] Senate Comm. on Public Works, 93rd Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972* (1973), at 1509 (hereafter "Legislative History").

[3] *Id.* at 1386.

or fill operation, Senator Muskie, the author of S.2770, opposed those amendments.[4] He proposed instead that the Secretary certify the need for any permit for discharge of dredged material to the Administrator, who would retain permit issuing authority. The Senate adopted Senator Muskie's proposal.[5]

The House of Representatives bill, H.R. 11896, on the other hand, gave the Secretary complete responsibility over issuing permits for the discharge of dredged or fill material. Although the House bill required the Secretary to consult with the EPA on the environmental aspects of permit applications, the Secretary had the authority to make the final decision on permit issuance.[6]

The Conference Committee substitute, passed by the Congress as § 404 of the Federal Water Pollution Control Act Amendments of 1972, represented a compromise between the Senate and House positions. It established a separate permit procedure for discharges of dredged or fill material to be administered by the Secretary, acting through the Chief of Engineers. The Administrator, however, retained substantial responsibility over administration and enforcement of § 404. The EPA responsibilities were perhaps best summarized by Senator Muskie during the Senate's consideration of the Conference Report:

> First, the Administrator has both responsibility and authority for failure to obtain a Section 404 permit or comply with the condition thereon. Section 309 authority is available because discharge of the "pollutant" dredge spoil without a permit or in violation of a permit would violate Section 301(a).
>
> Second, the Environmental Protection Agency must determine whether or not a site to be used for the disposal of dredged spoil is acceptable when judged against the criteria established for fresh and ocean waters similar to that which is required under Section 403.

[4] *Id.* at 1387–88.

[5] *Id.* at 1393.

[6] *Id.* at 816.

> Third, prior to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue.[7]

Subsequent amendment of § 404 by the Clean Water Act of 1977, 91 Stat. 1566, altered the relationship between the Secretary and the Administrator in only limited fashion. The amendments gave the Administrator authority comparable to the authority conferred on him by the § 402 NPDES program to approve and to monitor State programs for the discharge of dredged or fill material. 33 U.S.C. § 1344(g)-(l). New subsection (s) gave the Secretary of the Army explicit authority under the Act to take action to enforce those § 404 permits which he had issued. New subsection (n) cautioned that the amendments should not be considered to detract from the Administrator's enforcement authority under § 309 of the Act, 33 U.S.C. § 1319."[8]

With that background, I turn to your specific questions. First, you asked whether the Secretary or the Administrator has the authority under § 404 to resolve administrative disputes over interpretation of the jurisdictional term "navigable waters." That question is an important one, since the authority to construe that term amounts to the authority to determine the scope of the § 404 permit program.

The term "navigable waters," moreover, is a linchpin of the Act in other respects. It is critical not only to the coverage of § 404, but also to the coverage of the other pollution control mechanisms established under the Act, including the § 402

[7] *Id.* at 177. This statement, which is often quoted in explanation of the relative responsibilities of the Corps and EPA under § 404, is included in the Congressional Record as a supplement to Senator Muskie's oral remarks.

[8] Section 309 empowers the Administrator to order compliance with the conditions or limitations of permits issued under § 402 and State permits issued under § 404, and to seek civil and criminal penalties with respect to such permits. Importantly, as the above-quoted history of § 404 indicates, the section also gives the Administrator the authority to bring enforcement actions to stop discharges without a required permit, since such discharges violate the basic prohibition set out in § 301 of the Act. 33 U.S.C. § 1319.

permit program for point source discharges,[9] the regulation of discharges of oil and hazardous substances in § 311, 33 U.S.C. § 1321, and the regulation of discharges of vessel sewage in § 312, 33 U.S.C. § 1322. Its definition is not specific to § 404, but is included among the Act's general provisions.[10] It is, therefore, logical to conclude that Congress intended that there be only a single judgment as to whether—and to what extent—any particular water body comes within the jurisdictional reach of the Federal Government's pollution control authority. We find no support either in the statute or its legislative history for a conclusion that a water body would have one set of boundaries for purposes of dredged and fill permits under § 404 and a different set for purposes of the other pollution control measures in the Act. On this point I believe there can be no serious disagreement. Rather, understanding that "navigable waters" can have only one interpretation under the Act, the question is whether Congress intended ultimately for the Administrator or the Secretary to describe its parameters.

The question is explicitly resolved neither in § 404 itself nor in its legislative history. My conclusion that the Act leaves this authority in the hands of the Administrator thus necessarily draws upon the structure of the Act as a whole. First, it is the Administrator who has the overall responsibility for administering the Act's provisions, except as otherwise expressly provided. § 101(d), 33 U.S.C. § 1251(d). It is the Administrator as well who interprets the term "navigable waters" in carrying out pollution control responsibilities under sections of the Act apart from § 404.

Additionally, while the Act charges the Secretary with the duty of issuing and assuring compliance with the terms of § 404 permits, it does not expressly charge him with responsibility for deciding when a discharge of dredged or fill material into the navigable waters takes place so that the § 404 permit requirement is brought into play. Enforcement au-

[9] The Act, as stated above, contains a general prohibition against the "discharge of any pollutant" except in compliance with particular standards and permit procedures. § 301(a), 33 U.S.C. § 1311(a). The definition of the phrase "discharge of pollutants" includes a discharge from a point source into "navigable waters." § 502(12), 33 U.S.C. § 1362(12).

[10] "Navigable waters" is defined under the Act as meaning "the waters of the United States, including the territorial seas." § 502(7), 33 U.S.C. § 1362(7).